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THE

U. S. MINING LAWS,

AND THE

DECISIONS

OF THE

Commissioner of the General Land Office

AND THE

SECRETARY OF THE INTERIOR

THEREUNDER;

TOGETHER WITH THE CIRCULAR INSTRUCTIONS FROM THE GENERAL LAND OFFICE, AND FORMS FOR ESTABLISHING PROOF OF CLAIMS; ALSO, THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES UNDER THE MINING ACTS.

BY D. K. SICKELS,
GENERAL LAND OFFICE, WASHINGTON, D. C.

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PREFACE.

Under the mining laws of the United States the same questions are rarely presented both to the Judicial and Executive branches of the Government for decision. In the former the questions usually relate in some manner to the possession of the mining claim. In the latter they relate to the acquisition of title in pursuance of the law and the decisions of the courts.

Experience has demonstrated that the proceedings in the executive offices involve the decision of many delicate points of law and forms of pleading. A peculiar practice has grown up under these laws, both before the courts and in the Land Department. The practitioner must receive a special training in order to give good advice to, or successfully represent, his client. And whether he practices before the courts or in the land office, the mining lawyer should have handy, for reference, the authoritative citation of decisions controlling the action of the court or officer before whom he appears as the representative of a suitor.

The object sought in collecting these decisions has been to place in the hands of the attorney a book to which he may refer for authority upon any point which may have been raised in the cases heretofore presented to the *Land Office* for action. The cases already decided have probably involved, to some extent, the majority of the questions which are likely to arise in the future.

The aim has been to arrange these decisions in chapters, under appropriate headings (as Location, Survey, Adverse

Claims, etc.), so as to present them in an orderly manner, and at the same time render the book convenient in reference.

As regards *Forms* of proof, it may be stated that they generally prove of great benefit, not only in the saving of time to the person preparing the papers, but to the land office in the examination of the same. Nevertheless it is well to suggest the caution that the prepared forms are not proper in all cases. Particularly is this true of the blank used for application for patent. This paper should always be prepared with great care.

Persons desirous of obtaining information regarding Mexican mining laws, from which many of the local laws and customs in the mining districts in the United States have grown, are referred to "Halleck's Collection of Mining Laws of Spain and Mexico," printed in 1859 by O'Meara & Painter, 132 Clay street, San Francisco.

The compiler of these decisions acknowledges himself under obligation to Messrs. W. C. Hill and E. C. Ford, attorneys at law; C. A. Boynton, of the General Land Office, and R. S. Morrison, of the Colorado Bar, for valuable assistance and suggestions. Mr. Morrison's "Mining Digest" is a very valuable production; and to the mining lawyer who practices before the courts it is especially recommended.

WASHINGTON, D. C., December, 1880.

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ERRATA.

Page 43, last word should be "Revised."
Page 79, line next to last, read "Helmick" for "Helnuck."
Page 100, line 10, read "should not be" for "should be."
Page 180, line 6, read "omit" for "admit."
Page 516, line 6, read "Bogy" for "Bogg."

CHAPTER I.

LAWS.

No. 1. Revised Statutes. Section 910. Judiciary.
No. 2. Revised Statutes. Section 2318 to 2351. Mining and coal lands.
No. 3. Original mining act of July 26, 1866.
No. 4. Placer act of July 9, 1870.
No. 5. Act of May 10, 1872.
No. 6. Act of February 18, 1873, in relation to Michigan, Wisconsin, and Minnesota.
No. 7. Act of March 1, 1873, in relation to annual expenditures.
No. 8. Act of June 6, 1874, in relation to annual expenditures.
No. 9. Act of February 11, 1875, in relation to expenditures on tunnels.
No. 10. Act of May 5, 1876, in relation to Missouri and Kansas.
No. 11. Act of June 3, 1878, in relation to use of timber on public land for domestic and mining purposes.
No. 12. Act of January 22, 1880, amendatory of sections 2324 and 2325, U. S. Revised Statutes.

REVISED STATUTES.

No. 1. JUDICIARY.

February 27, 1865, c. 64, s. 9, v. 13, p. 441.

Possessory actions for recovery of mining titles.

SECTION 910. No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

No. 2. MINERAL LANDS AND MINING RESOURCES.

TITLE xxxii, CHAPTER 6.

July 4, 1866, c. 166, s. 5, v. 14, p. 86. March 3, 1875, c. 139, ss. 11, 15, v. 18, p. 476.

Mineral lands reserved.

SECTION 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.*

* Morton v. Nebraska, 21 Wall. 660.

May 10, 1872, c. 152, s. 1, v. 17, p. 91. May 5, 1876, c. 91, v. 19, p. 52.

Mineral lands open to purchase by citizens.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.*

May 10, 1872, c. 152, s. 2, v. 17, p. 91. May 5, 1876, c. 91, v. 19, p. 52.

Length of mining-claims upon veins or lodes.

SEC. 2320. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other.

May 10, 1872, c. 152, s. 7, v. 17, p. 94. May 5, 1876, c. 91, v. 19, p. 52.

Proof of citizenship.

SEC. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on

* United States v. Gear, 3 How. 120; Forbes v. Gracey, 94 U. S. 762.

his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

May 10, 1872, c. 152, s. 3, v. 17, p. 91. May 5, 1876, c. 91, v. 19, p. 52.

Locators' rights of possession and enjoyment.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

May 10, 1872, c. 152, s. 4, v. 17, p. 92. May 5, 1876, c. 91, v. 19, p. 52.

Owners of tunnels, rights of.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist,

discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel or veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

May 10, 1872, c. 152, s. 5, v. 17, p. 92. June 6, 1874, c. 220, v. 18, p. 61. May 5, 1876, c. 91, v. 19, p. 52.

Regulations made by miners.

SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators,

their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

May 10, 1872, c. 152, s. 6, v. 17, p. 92. May 5, 1876, c. 91, v. 19, p. 52.

Patents for mineral lands, how obtained.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such

notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the the terms of this chapter.

May 10, 1872, c. 152, s. 7, v. 17, p. 93. May 5, 1876, c. 91, v. 19, p. 52.

Adverse claim, proceedings on.

SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of

the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever.

May 10, 1872, c. 152, s. 8, v. 17, p. 94. May 5, 1876, c. 91, v. 19, p. 52.

Description of vein-claims on surveyed and unsurveyed lands.

SEC. 2327. The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

May 10, 1872, c. 152, s. 9, v. 17, p. 94. May 5, 1876, c. 91, v. 19, p. 52.

Pending applications; existing rights.

SEC. 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land-office; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued

shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

July 9, 1870, c. 235, s. 12, v. 16, p. 217.

Conformity of placer-claims to surveys, limit of.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

July 9, 1870, c. 235, s. 12, v. 16, p. 217.

Subdivisions of ten-acre tracts; maximum of placer locations.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

May 10, 1872, c. 152, s. 10, v. 17, p. 94. May 5, 1876, c. 91, v. 19, p. 52.

Conformity of placer-claims to surveys; limitation of claims.

SEC. 2331. Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and

where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered, by any party qualified by law, for homestead or pre-emption purposes.

July 9, 1870, c. 235, s. 13, v. 16, p. 217.

What evidence of possession, etc., to establish a right to a patent.

SEC. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent.

May 10, 1872, c. 152, s. 11, v. 17, p. 94. May 5, 1876, c. 91, v. 19, p. 52.

Proceedings for patent for placer-claim, etc.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a

placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

May 10, 1872, c. 152, s. 12, v. 17, p. 95. May 5, 1876, c. 91, v. 19, p. 52.

Surveyor-General to appoint surveyors of mining-claims, etc.

SEC. 2334. The Surveyor-General of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land-office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land-office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land-office.

May 10, 1872, c. 152, s. 13, v. 17, p. 95. May 5, 1876, c. 91, v. 19, p. 52.

Verification of affidavits, etc.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural

character of the land, the testimony and proofs may be taken as herein provided, on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

May 10, 1872, c. 152, s. 14, v. 17, p. 96. May 5, 1876, c. 91, v. 19, p. 52.

Where veins intersect, etc.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern; and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

May 10, 1872, c. 152, s. 15, v. 17, p. 96. May 5, 1876, c. 91, v. 19, p. 52.

Patents for non-mineral lands, etc.

SEC. 2337. Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superfices of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

July 26, 1866, c. 262, s. 5, v. 14, p. 252. May 5, 1876, c. 91, v. 19, p. 52.

What conditions of sale may be made by local legislature.

SEC. 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines,

involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

July 26, 1866, c. 262, s. 9, v. 14, p. 253.

Vested rights to use of water for mining, etc.; right of way for canals.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.*

July 9, 1870, c. 235, s. 17, v. 16, p. 218.

Patents, pre-emptions, and homesteads, subject to vested and accrued water rights.

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

July 26, 1866, c. 262, s. 10, v. 14, p. 253.

Mineral lands, in which no valuable mines are discovered, open to homesteads.

SEC. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such home-

* Basey v. Gallagher, 20 Wall. 670; Union M. & N. Co. v. Farris, 2 Saw. 176.

steads shall have have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads."*

July 26, 1866, c. 262, s. 11, v. 14, p. 253.

Mineral lands, how set apart as agricultural lands.

SEC. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

July 26, 1866, c. 262, s. 7, v. 14, p. 252.

Additional land districts and officers, power of the President to provide.

SEC. 2343. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

May 10, 1872, c. 152, s. 16, v. 17, p. 96. July 9, 1870, c. 235, s. 17, v. 16, p. 218. May 5, 1876, c. 91, v. 19, p. 52.

Provisions of this chapter not to affect certain rights.

SEC. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

February 18, 1873, c. 159, v. 17, p. 465.

Mineral lands in certain States excepted.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which

* Heydenfeldt v. Daney Gold Co., 93 U. S. 634.

are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the States named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

January 30, 1865, Res. No. 10, v. 13, p. 567.

Grants of lands to States or corporations not to include mineral lands.

SEC. 2346. No act passed at the first session of the thirty-eighth congress, granting lands to States or corporations to aid in the construction of roads, or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which, in all cases, are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

COAL.

March 3, 1873, c. 279, s. 1, v. 17, p. 607.

Entry of coal-lands.

SECTION 2347. Every person above the age of twenty-one years who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

March 3, 1873, c. 279, s. 2, v. 17, p. 607.

Pre-emption of coal-lands.

SEC. 2348. Any person or association of persons severally qualified as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

March 3, 1873, c. 279, s. 3, v. 17, p. 607.

Pre-emption claims of coal-lands to be presented within sixty days, etc.

SEC. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

March 3, 1873, c. 279, s. 4, v. 17, p. 607.

Only one entry allowed.

SEC. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions

thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

March 3, 1873, c. 279, s. 4, v. 17, p. 607.

Conflicting claims.

SEC. 2351. In case of conflicting claims upon coal lands, where the improvements shall be commenced after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase; and also where improvements have been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

March 3, 1873, c. 279, s. 6, v. 17, p. 607.

Rights reserved.

SEC. 2352. Nothing in the preceding five sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

No. 3. ORIGINAL MINING LAW OF JULY 26, 1866.

An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to ex-

ploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

SEC. 2. *And be it further enacted,* That whenever any person, or association of persons, claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land-office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

SEC. 3. *And be it further enacted,* That upon the filing of the diagram, as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land-office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and no-

tice have been posted on the claim during the said period of ninety days, the register of the land-office shall transmit to the General Land-office said plat, survey, and description, and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

SEC. 4. *And be it further enacted*, That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid; and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country, and the local rules, laws, and customs of miners; *provided*, that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules: *And provided further*, that no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

SEC. 5. *And be it further enacted*, That as a further condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 6. *And be it further enacted*, that whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases.

SEC. 7. *And be it further enacted,* that the President of the United States be, and is hereby authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

SEC. 8. *And be it further enacted,* that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

SEC. 9. *And be it further enacted,* that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *provided, however,* that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 10. *And be it further enacted,* that wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or said parties may avail themselves of the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

SEC. 11. *And be it further enacted,* that upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

Approved July 26, 1866.

No. 4. PLACERS.

Chap. CCXXV.—An Act to amend "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act:

Placers—Survey.

SEC. 12. *And be it further enacted,* That claims, usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims: *Provided,* That where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre: *Provided further,* That legal subdivisions of forty acres may be subdivided into ten-acre tracts; and that two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof: *And provided further,* That no location of a placer claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United

States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

Statute of limitation.

SEC. 13. *And be it further enacted,* That where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by statute of limitations, for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim: *Provided, however,* That nothing in this act shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Verification of affidavit.

SEC. 14. *And be it further enacted,* That all *ex parte* affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated.

Fees.

SEC. 15. *And be it further enacted,* That registers and receivers shall receive the same fees for services under this act as are provided by law for like services under other acts of Congress; and that effect shall be given to the foregoing act according to such regulations as may be prescribed by the Commissioner of the General Land-office.

Surveys.

SEC. 16. *And be it further enacted,* That so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands: *Provided,* That all subdividing of surveyed lands into lots less than one hundred and sixty

acres may be done by county and local surveyors at the expense of the claimants: *And provided further*, That nothing herein contained shall require the survey of waste or useless lands.

SEC. 17. *And be it further enacted*, That none of the rights conferred by sections five, eight, and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

Approved July 9, 1870.

No. 5. ACT OF MAY 10, 1872.

An Act to Promote the Development of the Mining Resources of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled: That all valuable mineral deposits of lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

SEC. 2. That mining claims upon veins or loads of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the

customs, regulations, and laws in force at the date of their location. A mining claim located after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end lines of each claim shall be parallel to each other.

SEC. 3. That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States, and the state, territorial, and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations: *Provided*, That their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges: *And provided, further*, That nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

SEC. 4. That where a tunnel is run for the development

of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel.

SEC. 5. That the miners of each mining district may make rules and regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim. On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: *Provided*, That the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location. Upon

the failure of any one of several co-owners to contribute his proportion of the expenditures required by this act, the co-owners who have performed the labor or made the improvements, may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion to comply with this act, his interest in the claim shall become the property of his co-owners, who have made the required expenditures.

SEC. 6. That a patent for any land claimed and located for valuable deposits, may be obtained in the following manner: Any person, association, or corporation, authorized to locate a claim under this act, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this act, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons, that such notice has been duly posted as aforesaid, and shall file a copy of said notice in such land-office, and shall thereupon be entitled to a patent for said land, in the manner following: The register of the land-office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor

has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description, by such reference to natural objects or permanent monuments, as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during said period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act.

SEC. 7. That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended, or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the Register to the

Commissioner of the General Land-office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess. If it shall appear from the decision of the court, that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor-general, whereupon the Register shall certify the proceedings and judgment-roll to the Commissioner of the General Land-office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Proof of citizenship under this act, or the acts of July twenty-sixth, eighteen hundred and sixty-six, and July ninth, eighteen hundred and seventy, in the case of an individual, may consist of his own affidavit thereof, and in case of an association of persons unincorporated of the affidavit of their authorized agent, made on his own knowledge or upon information and belief, and in case of a corporation organized under the laws of the United States, or of any State or Territory of the United States, by the filing of a certified copy of their charter or certificate of incorporation; and nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever.

SEC. 8. That the description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued as aforesaid for claims upon unsurveyed lands, the Surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

SEC. 9. That sections one, two, three, four, and six of an act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision

in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining-claims heretofore issued under the act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.

SEC. 10. That the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims; but where said placer claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims hereafter located, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands: *Provided*, That proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases: *And provided also*, That where by the segregation of mineral land in any legal subdivision, a quantity of agricultural land less than forty acres remains, said fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

SEC. 11. That where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case (subject to the provisions of this act and the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for

other purposes," approved July ninth, eighteen hundred and seventy) a patent shall issue for the placer claim, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in the second section of this act, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

SEC. 12. That the Surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivisions of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this act; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated, for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the Register a sworn statement of all charges and fees paid by said applicant for publication and surveys, together with all fees and money paid the

Register and the Receiver of the land office, which statement shall be transmitted with the other papers in the case to the Commissioner of the General Land Office. The fees of the Register and the Receiver shall be five dollars each for filing and acting upon each application for patent or adverse claim filed, and they shall be allowed the amount fixed by law for reducing testimony to writing, when done in the land office; such fees and allowances to be paid by the respective parties; and no other fees shall be charged by them in such cases. Nothing in this act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, nor shall this act affect any right acquired under said act; and nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

SEC. 13. That all affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the Register and Receiver of the land office. In case of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided, on personal notice of at least ten days to the opposing party; or if said party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the Register of the land office as published nearest to the location of such land; and the Register shall require proof that such notice has been given.

SEC. 14. That where two or more veins intersect or cross

each other, priority of title shall govern, and such prior loca- shall be entitled to all ore or mineral contained within the space of intersection: *Provided, however*, That the subsequent location shall have the right of way through said space of intersection for the purposes of the convenient working of the said mine: *And provided, also*, that where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

SEC. 15. That where non-mineral land, not contiguous to the vein or lode, is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable under this act to veins or lodes: *Provided*, That no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this act for the superfices of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

SEC. 16. That all acts and parts of acts inconsistent herewith are hereby repealed: *Provided*, That nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws.

Approved May 10, 1872.

No. 6. An Act in relation to mineral lands.

Mining laws not applicable to Michigan, Wisconsin, and Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That within the States hereinafter named, deposits or mines of iron and coal be, and they are hereby excluded from the operations of an act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and said act shall not apply to the mineral lands situate and being within the States of Michigan, Wisconsin, and Minnesota, and that said lands are hereby declared free and open to exploration and purchase, according to the legal

subdivisions thereof, as before the passage of said act; and that any *bona fide* entries of such lands within said States, since the passage thereof, may be patented without reference to the provisions of said act.

Approved February 18, 1873.

No. 7.

Annual expenditures.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the tenth day of June, eighteen hundred and seventy-four.

Approved March 1, 1873.

No. 8. An Act to amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

Annual expenditures.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five.

Approved June 6, 1874.

No. 9. An Act to amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

Expenditures on tunnel.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That sec-

tion two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby amended, so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

Approved February 11, 1875.

No. 10. An Act to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Missouri and Kansas.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said States shall be subject to disposal as agricultural lands.

Approved May 5, 1876.

No. 11. An Act authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said

States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided,* The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Approved June 3, 1878.

No. 12. An Act to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States, concerning mineral lands.

Affidavits.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided,* That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its

authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided,* That this section shall apply to all applications now pending for patents to mineral lands."

Annual expenditures.

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided,* That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

Approved January 22, 1880.

CHAPTER II.

LOCATIONS.

No. 1. *a.* Must be substantially a parallelogram.
b. Middle of vein ascertained by exploration.
c. But one vein the basis of a location.
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a. May be altered or amended.
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c. May relocate in conformity with amended law.
No. 13. Act of 1866. Patents not issued in excess of 3000 feet along vein or lode.
Construction of 1st and 2d provisions of 4th section.
No. 14. Act of 1866. Consolidation of two or more locations.
No. 15. *a.* The act of May 10, 1872. Preserved claims previously located, with surface ground to which they were entitled at date of location.
b. A claim of 3000 feet, with width of 50 feet on each side of lode, can not be relocated subsequent to May 10, 1872, for more than 1500 feet along the lode, with additional width of surface ground.
When land is subject to re-location, see No. 22. *Adresse.*
Location made by "Miners' Relief and Territorial Poor Fund," void *ab initio.* See No. 4. Protest.

No. 1. LOCATION AND SURVEY OF MINERAL CLAIMS.

The location must be substantially a parallelogram.

The middle of a vein or lode must be ascertained by actual exploration and development, and can not be assumed to be in an unexplored position.

The mining law contemplates that the location shall be on *one vein*, and but one vein can be made the basis of the location.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 4, 1880.

ALBERT JOHNSON, *U. S. Surveyor General, Denver, Colorado.*

SIR: Referring to your letter of February 4, 1880, submitting tracings of two surveys, which you say appear to come directly under the ruling of this office, in the case of the Helvetia Lode, Lot No. 212, dated March 6, 1879, and asking for instructions with regard to approving the same, as shown by the tracings, is at hand, and has been considered.

Regarding the location of lode claims, section 2320 of the U. S. Revised Statutes reads as follows: "A mining claim, located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. * * * The end lines of each claim shall be parallel to each other."

Must be substantially a parallelogram.

The location contemplated by the law above quoted must have been essentially a parallelogram. The wording of the law evidently presupposes such a figure, or it would not have been made to read, *fifteen hundred feet in length by three hundred in width* on each side of the middle of the vein at the surface. Had the complicated figures shown in your tracings have been thought possible or likely to occur, the law would have been differently framed, in order to meet just such contingencies, for, as I shall endeavor to show, it is only when certain peculiar conditions exist that such location can be made to satisfy the intent of the Mining Act.

Locators' rights of possession and enjoyment are defined by section 2322 of the U. S. Revised Statutes to be as follows, to wit: "Locators shall have the exclusive right of possession and enjoyment of *all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically,* although such veins,

lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines of such surface locations. But their right of possession to such *outside parts* of such veins or ledges *shall be confined to such portions thereof as lie between vertical planes*, drawn downward, as above described, through the end lines of their location, so continued in their own direction that *such planes will intersect such exterior parts of such veins or ledges.* And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

The intent of the above-quoted section of the Revised Statutes was held by the Supreme Court in its decision in the case of the Flagstaff Silver Mining Company of Utah v. Helen Tarbet, Copp's Land Owner, June, 1879, page 42,* to be as follows:

Lengthwise of vein.

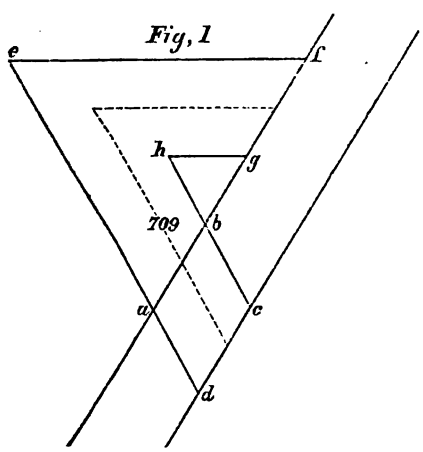
"That mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode and extend vertically downward, and that the right to follow the dip outside the side lines is based upon the hypothesis that the direction of those lines corresponds substantially with the course of the vein or lode at its apex on or near the surface."

"It was not the intent of the law to allow a person to make his location crosswise of a vein so that the *side lines shall cross it*, and thereby give him the right to follow the strike of the vein outside his side lines; that would subvert the whole system sought to be established by the law.

"As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim properly so called, which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave greater or less width according to the dip of the vein; but our laws have endeavored to establish a rule, by which each claim shall be

* 8 Otto, 463. No. 9. Decisions S. C.

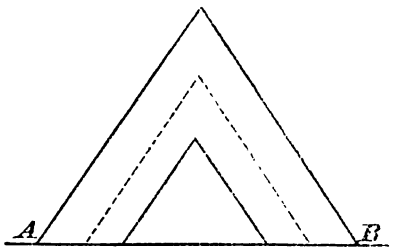
so many feet of the vein lengthwise of its course, to any depth below the surface, although laterally *its inclination may carry it ever so far from a perpendicular.*" Such a location as the one shown in survey No. 709 was evidently never contemplated by the law as above quoted, which clearly means that the claim must be contained between parallel end lines indefinitely extended, for the right of possession to the outside parts of such veins or ledges, as may extend in their downward course outside the vertical side lines of the surface location, is based upon the supposition that such right of possession is *limited and confined by the vertical planes drawn downward through the parallel end lines of the surface location extended indefinitely.**



By referring to the diagram of Sur. No. 709, it will be seen that only the part designated *a, b, c, d* is contained between parallel end lines indefinitely extended, that portion of the claim designated *a, e, f* not being limited as prescribed by law between parallel end lines; the claimant would be restricted—were such a location allowable—to perpendicular side lines. But it is not contemplated by the law

* *Vein can not be followed beyond the side lines of patent.*—The Ben Hardin lode was patented under the act of 1866. The Bell Tunnel lode was patented under the act of 1872. The vein of the former on its strike crossed its side lines and entered within the side lines of the Bell Tunnel lode, the developments tending to show identity of the veins: *Held*, that the vein of the Ben Hardin lode could not be followed beyond its side lines into the side lines of the Bell Tunnel lode; 2. That the grant of the vein, made under an act authorizing the following of the vein in its downward course to any depth, excluded the inference that the vein could be followed beyond the survey lot on its strike, or otherwise than on its downward course or dip; 3. Any local custom which might have existed, allowing the owner to follow the course of the discovered lode, would be in subordination to the acts of Congress, and could not enlarge the grant of a patent under the terms of the act of 1866. Wolfly v. Lebanon M. Co. 4 Col.

that he shall be so restricted, and therefore a location which on its face defeats the intent of the law is necessarily illegal.



A location made as shown in the annexed figure would, for the same reason, be illegal. The end lines extended would form one and the same line; the initial planes of the end lines would be identical—contingencies never contemplated by the law, and not applicable under its conditions.

Attention is called in your letter to red lines drawn through the middle of each of the surveys, Nos. 462 and 709, marked "center of vein," and the deputy says: "The discovery shaft is found in the former to be about 95 feet southerly from the center of the vein, and the center of the vein is in the middle, between the side lines of said survey. and that the red lines indicate the center of the lode."

In the very nature of the thing a lode or vein, in its unworked and undeveloped stage, can not be known and surveyed so as to plat it and make a diagram of it.

No developments or workings are shown upon the lines indicated in the tracings as the center lines of the veins, although in both instances shafts are shown at a considerable distance therefrom.

Particularly is this the case with survey No. 462.

In neither case are any workings indicated or proof offered to show that the lodes or veins make the extraordinary departures from a straight course shown upon the tracings; a line is simply drawn through the center of the claim and called the "center of the vein."

Middle of vein ascertained by actual exploration.

This assumption that the middle of the vein is in an unexplored position is unwarrantable. The middle of the vein must be ascertained by actual exploration and development, or the discovery shaft must, for executive purposes, be taken as the middle of the vein, and the lateral measurements made therefrom.

Concerning the diagrams forwarded by you, and not hereinbefore specifically explained, I may best remark that the statute contemplates a lode location to be *substantially* a parallelogram; and that the several calls of the statute, the grant of right, the limitation of rights, and the theory of the law, all point to this conclusion.

I do not intend to be understood as construing the law as requiring a perfect parallelogram, but it must not vary largely from that figure, for such material variance involves conditions which, in a greater or less degree, according to circumstances which at the date of location, and patent even, are most frequently unknown quantities, conflict with the theory of the law, render uncertain the property rights of adjoining owner or owners in the vicinity, and in a patent which should convey the property in that form which will at least render an application of the law to its subsequent use possible, result in rich and apt material for litigation.

A portion of a side line can not properly be made an end line. Lodes and veins do not separately run in the tortuous manner represented in the diagrams of surveys Nos. 462, 709, and 212.

If the topography of the country does not permit the claimant to take under the law all he claims, yet he must abide by the law.

One vein the basis of a location.

The law contemplates that he shall make his location on *one vein*, and while certain rights attach to other veins whose top or apex is found within his surface boundaries, yet but one vein can be made the basis of his location.

It is from the middle of that vein that his lateral measurements must be made. The surveys Nos. 462, 709, and 212 indicate the probability that they were made with the intent to embrace therein different and distinct lodes. An examination of the attached plat of the Jay Lode, lot No. 169, Boulder county, Colorado, indicates the ease with which surveys, such as you submit, could include several separate and distinct veins, and as a geological proposition

it is extremely improbable that the survey you forward can be defended.*

I can not authorize their approval in their present form, and before giving them your approval, you will require such modification as will bring them within the proper form as above indicated.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 2. Two or more locations, in extension, upon the same lode not prohibited by law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 17, 1873.

Messrs. HOYT & BROTHERS, *Helena, Montana.*

GENTLEMEN: Referring to your letter of the thirtieth ultimo, I have to state that the mining act of May 10, 1872, declares that, "a mining claim located after the passage of this act, whether located by one or more persons, may equal but shall not exceed one thousand five hundred feet in length along the vein or lode."

But there is no provision of law to prevent parties from locating other claims upon the same lode, outside of the first location made on the lode or vein.

If a lode or vein three thousand feet in length is discov-

* *Vein confined to its side lines.*—Under the mining laws of the United States, unaided by any supplementary miners' rules, there is no way of locating a quartz vein except by marking out surface lines; and where these lines have been marked they can not be changed so as to take in ground that has been located by others prior to such attempted change. The Golden Fleece lode mining claim was located in 1874, upon a vein supposed to run in the direction of its location, north, 45 degrees west. Afterwards the Leonard Lode, owned by the defendant, was located as a claim running due north and south. As thus located the interference was slight, the Golden Fleece claim cutting off only a few feet of the survey of the Leonard. After a patent had been applied for on the Leonard Lode, the Golden Fleece was resurveyed upon the true course of the lode as developed, and adversed the Leonard Lode as a location covering a large part of its area, including its outcrop and workings. The discoveries were several hundred feet apart. At the time of the original location of the Golden Fleece, the course of the vein was supposed to be at an angle which proved to be nearly a right angle to its real course: *Held*, that the lines of the original location could not be changed so as to interfere with claims subsequently located. Golden Fleece Co. v. Cable Con. Co., 12 Nev. 329.

ered, two locations may be made, each of fifteen hundred feet, thereon.

Very respectfully,
Your obedient servant,
W. W. CURTIS, *Acting Commissioner.*

No. 3. Location made on Sunday not invalid, if not prohibited by local law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 29, 1880.

FRANCIS CUNNINGHAM, Esq., *Visalia, California.*

SIR: In reply to your two letters of 12th instant—one having been referred to this office by the Hon. Secretary, to whom it was directed—you are advised that a mining claim would not, under United States laws, be invalid merely because located on Sunday. If your State and local laws do not prohibit locations on the Sabbath, the location would be legal.

Very respectfully,
J. A. WILLIAMSON, *Commissioner.*

See decision of Secretary of the Interior, July 17, 1879, Dolly Varden case, No. 45—Adverse Claims.

No. 4. EFFECT OF LOCAL LAWS.

The location of a mining claim in Colorado must comply with the requirements of the state law governing the location of mining claims.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Sept. 25, 1880.

ALFRED H. HALE, Esq., *Ohio, Gunnison Co., Colorado.*

SIR: I am in receipt of your communication dated July 23, 1880, wherein you inquire whether the act of Congress, approved January 22, 1880, amendatory of the mining act, annuls the Colorado state law in regard to the same matter: That is—"Is a man compelled to sink a ten-foot shaft, or its equivalent, inside of sixty days, to secure his claim from relocation?"

The Colorado statute "*governing the location,* manner of recording, amount of work necessary to hold possession of a mining claim," is an enactment made in pursuance of the power conferred by section 2324 United States Revenue

Statutes, and is in force, except so far as it may conflict with express enactment by Congress.

One of the conditions prescribed by the state legislature "governing the location" of a mining claim is, that the locator or discoverer "shall locate his lode by—first, sinking a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice; second, by posting at the point of discovery on the surface a plain sign or notice," etc.

Another provision is as follows: "The amount of work done, or improvements made, during each year, shall be that prescribed by the mining laws of the United States."

Local law must be complied with.

I therefore answer your inquiry in the affirmative; the locator of a mining claim must perform all acts required by the statute, or the local rules and regulations adopted by the miners in the absence of statutory provisions relating to such locations.* I see no reason why the labor or expenditures necessary to comply with the law in making the location should not apply to the expenditures required by law to be made during the first year.†

Under the provisions of the act of Congress, approved January 22, 1880, a claim located, for instance, on the first day of July, 1880, and requiring an expenditure of, say fifty dollars, to sink the necessary shaft, etc., it will not be necessary to perform the remaining fifty dollars' worth of work required to complete the prescribed annual expenditure of one hundred dollars, until the 31st day of December, 1881, the year within which such annual expenditures must be completed, beginning to run from the first day of January next succeeding the date of location.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

* When the district laws point out directly how mining claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued, and a failure to do so might work a forfeiture of the ground. Mallett v. Uncle Sam Mining Company, 1 Nev. 194.

† See letter to Hon. N. P. Hill, November 10, 1880: No. 7, *Annual Labor.*

No. 5. Construction of Section 2320 Revised Statutes, as to width of location.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 20, 1873.

R. O. OLD, Esq., *Georgetown, Colorado Territory.*

SIR: Referring to your letter of the tenth instant, I have to state that the second section of the mining act of May 10, 1872, declares that "no claim shall extend more than three hundred feet on each side of the middle of the vein, at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein, at the surface," etc.

The uniform construction which has been given this portion of said section by this office, is that no claim located after May 10, 1872, can *exceed* six hundred feet in width, under any circumstances. Whether a location made after May 10, 1872, can *equal* six hundred feet in width, depends entirely upon the local regulations, or state or territorial laws in force in the several mining districts.

By the statutes of Colorado, approved February 9, 1866, a mining claim is limited to "twenty-five feet in either direction from the center of the * * lode or vein."

The act of May 10, 1872, simply declares that a mining claim located after the passage of said act, shall not *exceed* three hundred feet in width on each side of the center of the vein, and that surface right shall not be limited to less than fifty feet in width, unless adverse claims existing on the tenth of May, 1872, render such lateral limitation necessary.

Location may extend to six hundred feet in width, subject to local laws or mining regulations, and shall not be less than fifty feet in width.

The miners of the district, or the state or territorial legislatures, are authorized by the act to regulate and control the *width* of a location; *providing*, however, that the width shall not exceed six hundred feet, nor be limited to less than fifty feet.

Where an application is made for a patent for a mine located *prior* to May 10, 1872, the patent, when issued, conveys to the grantee the right to follow the particular lode

named in the patent to the number of feet expressed in said conveyance, although the lode should, in its course, leave the surface ground described in the patent, and enter the land adjoining.

The patent not only grants him the right to follow the particular lode named to the number of feet expressed in the patent, along the course thereof, but also grants him the right to follow said lode to any depth.

The patent also conveys to the grantee the right to follow all other veins, lodes, or ledges, the tops or apexes of which lie within the exterior boundary lines of his survey, if the same were not adversely claimed on the tenth of May, 1872, only to such an extent, however, along the course thereof, as may be embraced by such exterior boundaries, but to any depth.*

Where application for patent for a mill site is made, satisfactory proof must be furnished that the land claimed is not mineral in character.

Very respectfully, etc.,

W. W. CURTIS, *Acting Commissioner.*

No. 6. Secondary evidence of location and possessory title received when the claim is not located in a regularly organized mining district.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Nov. 12, 1872.

D. W. LICHTENTHALER, Esq., *Le Grand, Oregon.*

SIR: * * * * In the event of a mining claim being situate outside of any regularly constituted mining district, affidavit of the fact should be made and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to the location, occupation, and possession of such claim; and any deeds, certificates of location, or purchase or other evidence, which may be in the defendant's possession and tend to establish his claim. Very respectfully,

W. W. CURTIS, *Acting Commissioner.*

* A person locating a claim larger than allowed by law, may still hold the extra area, except as against one locating in pursuance of the rules. English v. Johnson, 17 Cal. 108.

No. 7. Parties are bound by the record.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 11, 1873.

Messrs. BRITTON & GRAY, *Washington, D. C.*

GENTLEMEN: I have carefully considered the application made by you, as attorneys for C. H. Morris, for a rehearing in the matter of the application for patent for the Dunkirk lode, Colorado.

The location of the Dunkirk lode is for 3,000 feet, which shows clearly that the location was intended to be made under the act of July 26, 1866, as no regulation or law, prior to that time, authorized the location of 3,000 feet for a mining claim in Colorado.

The date of the location is September 3, 1867, in the record. This can not be taken or considered as the date of filing, for two reasons, viz.:

First. This date is given by the locators themselves as the date of their location.

Second. The filing of this notice with the proper Recorder was on the twelfth of September, 1867, as appears by the indorsement of the Recorder thereon.

Parties are bound by the record which they make, and it has been the uniform rule of this office, at least since 1871, to confine them to the dates fixed by them, in their notice and record of location.

It is true, that on the twenty-fifth August, 1871, a letter was written in the Silver Ore case, authorizing proof not in the record to be submitted; but, upon a full consideration of the matter, the claimant of the Silver Ore lode was limited and restricted to the number of feet authorized at the date of his notice of location.

But if I entertained any doubt as to the correctness of the rule prescribed in my letter of September 17, 1873, in the Dunkirk case, which I do not, the applicant is not entitled to a modification of that decision, as it was originally made June 10, 1872, long before the application for patent was made.

Your application for a rehearing is therefore overruled.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 8. Letter to George M. Parsons.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 26, 1880.

GEORGE M. PARSONS, Esq., *Rocky Bar, Idaho.*

SIR: In reply to your letter of 27th January last, you are informed:

Party not allowed to enter claim or possession of another person to discover vein or lode.

1. That a party is not authorized to go within the claim and possession of another party and discover a ledge on which he may base a location.* Hence his location would be void, and, so far as this office is concerned, the location of a third party upon a ledge outside the first location, but within the second, would probably be recognized as legal. The matter is one, however, which would doubtless be adjudicated in the courts, whose decisions this office would only be called upon to execute in the event of application for patent.

Record should conform to location on the ground.

2. A locator's record should conform to the actual location on the ground, and the only proper method to correct a mistake of the kind you name would be to make a new location and new record.

3. It can not properly be stated just how far a locator may deviate from the plain requirements of section 2324, U. S. Revised Statutes, in making his location, and yet save his claim. Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 9. QUESTION OF ABANDONMENT.

1. The location of mineral land has the effect of an appropriation thereof, so far as preventing valid relocations until the same has been abandoned.

2. Abandonment is a question of fact, to be determined after due and regular hearing.

* *Location within lines of prior location.*—Ground duly located and staked can not be entered for prospecting purposes as if it were vacant ground, and if veins are supposed to exist therein other than the one upon which the original locator claims, such veins must be found outside and traced into the limits of the claim staked, or otherwise proved to exist, before the holder of such second vein can enter the limits of the claim on the first discovery. Atkins v. Hendree, 1 Ida. 108.

See, also, to the same effect, the decision of Judge Moody (First Jud. Dist. Dakota) in case of Golden Terra Mining Co. v. Maher et al.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., June 29, 1878.

SIR: I have considered the case of France, Pontez et. al. v. F. A. Harrington, applicant for patent on the Omaha Soda Mine Claim, Carbon County, Wyoming Territory, on appeal from your decision of November 9, 1877, rejecting the application of Harrington, and permitting France, Pontez et. al. to complete the proceedings in the matter of their application for patent for the same premises under the name of the Centennial Soda Mine.

In my opinion, this case should be determined upon its merits. I can not concur in the view of counsel for appellant that the action of your office, December 8, 1876, recognizing the claim of Harrington, was correct, or that you erred in reopening the case. The facts in relation to the respective claims are stated at length in your letters of December 8, 1876, and November 9, 1877, and are substantially as follows:

Harrington bases his claim to the property, and his application for a patent, both upon a location of the premises made September 12, 1873, by himself, Bowy, Earnest, and Thomas Gun, and upon a location made by himself September 10, 1875, according to the rules and regulations of the Natrona Mining District, in which the mine is located, which district was organized September 8, 1875.

I do not deem it necessary to enumerate all the proceedings in connection with the claim, as the right to a patent primarily depended upon the validity of either the last location, or of both locations. Section 2324 of the Revised Statutes is as follows:

"SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be easily traced. All records of mining claims hereafter made shall contain the name or names of

the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed, or improvements made, during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed, or improvements made, by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length, along the vein, until a patent has been granted therefor, but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." * * *

Mineral lands appropriated by location.

Under the provisions of this section it follows that, if a tract has once been legally appropriated, and the terms of the law have been complied with, or, in other words, if the premises have not been abandoned, or, if once abandoned, have again been occupied and possessed by the original locators, their heirs, assigns, or legal representatives, prior to relocation by other parties, said premises are not subject to relocation.

It appears that James Harbury located the premises in dispute, June 15, 1871, and under date of October 12, 1871, transferred his right to L. Shaffer, R. W. Baxter, and James France, for the sum of two hundred and fifty dollars. On the 23d of May, 1872, Shaffer, Baxter, and France located the premises under the provisions of the act of May 10, 1872. If this location had been abandoned by them prior to September 12, 1873, or prior to September 10, 1875, the tract was subject to relocation by Harrington et al., or by Harrington alone; but if not abandoned, said relocation

was invalid. It is asserted by those claiming under the original locators that the tract was not, neither has it been, abandoned, but that the terms of the law have been complied with, and that they possess the superior right to the premises. Affidavits have been filed in support of this allegation. On the other hand, it is asserted by Harrington that the claim was abandoned prior to September 12, 1873, and that it has been abandoned by them since that date.

The statements and affidavits in support of these respective claims are all ex parte, and are simply irreconcilable. In my opinion, no correct or intelligent decision can be rendered in this case upon the ex parte evidence now before the Department.

Abandonment a question of fact.

The question of abandonment is one of fact, which should be determined upon evidence submitted in due form before some officer authorized to receive the same, with opportunity for cross-examination. I think your office erred in deciding the case without attempting to ascertain the facts by means of a hearing. The question being one of fact, the proper method of obtaining evidence should have been employed.* It follows as a logical sequence, that the action of your office, approving the subsequent application of France, Pontez et al., filed November 14, 1876, for a patent for the same premises, was erroneous, as no action on this application should have been taken until all ques-

* In the courts:

1. *Law and Fact.*—Abandonment is a mixed question of law and fact. If. in this case, the plaintiff intended to give up his claim, and, in pursuance of that intention, quit paying assessments, it was an abandonment in fact. Doak v. Brubaker, 1 Nev. 217.

2. *Intention—Law and Fact.*—Abandonment is a mixed question of law and fact. If, in fact, a person intend to give up his claim and quit paying assessments in pursuance of that intention, it is an abandonment in fact. Oreamvono v. Uncle Sam G. & S. M. Co., 1 Nev. 215.

3. *Intention.*—Abandonment is a question of intention. Weill v. Lucerne M. Co., 11 Nev. 200.

4. *Intention—District Rules.*—Abandonment, in its common law sense, is purely a question of intention. An abandonment takes place when the ground is left by the locator, without any intention of returning or making any future use of it, independent of any mining rule or regulation. St. John v. Kidd, 26 Cal. 263.

5. Abandonment is a question of fact for the jury. Weill v. Lucerne M. Co., 11 Nev. 200.

tions relating to the prior application of Harrington had been properly disposed of upon their merits.

Your decision on both points is, therefore, overruled, and you are instructed to order a hearing on the question of the abandonment of the prior location, made by Shaffer, Baxter, and France, May 23, 1872. The respective parties should be permitted to introduce evidence on this point. Evidence relating to the original location, the value and nature of the improvements and labor placed upon the claim, and when the labor was performed thereon; the nature of the possession of the premises, or acts or circumstances indicating an abandonment of the same, may be introduced. The hearing, however, should be confined to these points, viz.: The abandonment of the location of Shaffer, Baxter, and France, prior to September 12, 1873, or prior to September 10, 1875; or, in other words, the validity of the location of Harrington et al., or of Harrington alone, at either or both of the dates above mentioned. In order that there may be no misunderstanding on this point, I will repeat the proposition in a different form:

Should it be established that Shaffer, Baxter, and France had not abandoned their claim prior to September 12, 1873, the location of Harrington, Earnest, and Gun at that date was invalid, and no rights can be asserted thereunder; but it does not follow, that should it be shown that Shaffer, Baxter, and France abandoned their claim prior to September 10, 1875, Harrington has no right under his location of the last mentioned date. If the premises were subject to location at that date, the action of Harrington, Earnest, and Gun in 1873 would not affect the right of Harrington under his location of 1875; the question would be one simply between the locator and the Government, in the absence of an adverse claimant.

Should it be found that Shaffer, Baxter, and France had abandoned the premises prior to September 12, 1873, and that the same were subject to relocation by Harrington, Earnest, and Gun, and were properly relocated at that date by them, Shaffer et. al. can base no rights upon a re-occupation of the premises in the absence of a proper relocation, for the reason that all rights based upon their location in May, 1872, were forfeited by abandonment and by the legal

relocation of Harrington et al. in September, 1873, and have not been reasserted in the manner prescribed by law since that date. Should it be shown, however, that the relocation of Harrington et al. in 1873 was not according to law, and was invalid, even though the premises had been abandoned, and it is established that Shaffer, Baxter, and France had occupied the premises, as provided in section 2324 of the Revised Statutes, prior to the location of Harrington in September, 1875, and were in possession at that date, said location of Harrington was invalid, and must be treated accordingly.

These points should be determined first, and should it be found that the relocation of the last named parties was valid, the application of Harrington for a patent should be determined upon its merits. Should it be found that both the relocation in 1873 and of 1875 were invalid, the application of Harrington must be rejected, and the application of France, Pontez et al. should be disposed of upon its merits.

This hearing should be held before the local officers, after due notice given to all parties.

If, in order to save expenses and to expedite the proceedings, the respective parties should agree among themselves to that effect, depositions may be taken before some other officer or officers authorized to administer oaths. This, however, should only be done with the consent of both parties, and with full opportunity for cross-examination. When the evidence is received, the question should be determined upon its merits.

The papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

Commissioner of the General Land Office.

No. 10. Regulations in regard to relocations.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 21, 1876.

Register and Receiver, Central City, Colorado.

GENTLEMEN: * * * * The fifth section of said mining act (May 10, 1872) requires certain annual expenditures

to be made upon mining claims, and provides that in case the required expenditures are not made, such claims shall be subject to relocation. It also declares the manner in which the title of the co-owners shall become forfeited upon their failure to contribute their proportion of the required amount specified in the act.

If for purpose of changing surface boundaries, file evidence of title.

The act of Colorado, approved February 13, 1874, declares the manner in which relocations may be made in that Territory. Where relocations are made under the Colorado act, by parties who have the possession and the right of possession to a mining claim, for the purpose of changing the surface boundaries, increasing the width of surface ground, or other reason, the parties who apply for patents for such mines should file a copy of the original notice of location, an abstract of title, tracing the record title from the original locators to the relocators, a copy of the relocation notice, and an abstract of any transfers made of the relocation.*

If of abandoned mine, file proof of abandonment.

Where parties make applications for patents for mines which have been relocated as *abandoned*, they should file with their application a copy of the relocation notice, and an abstract of all the transfers thereunder. They should also file proof, *full, positive, and complete*, in regard to the abandonment of the prior location, setting forth the facts necessary to show such abandonment.†

Forfeiture of co-claimant.

Where a party applies for a patent for a mine to which he claims the right of possession, by reason of the fact that

* *Several Owners—Forfeited Claim.*—If several, as tenants in common, locate a mining claim on the public lands, and by failure to comply with the local mining laws, forfeit the same, it may be relocated by a part of the first locators, along with others who were strangers to the first location; and the tenants in common whose names are left out in the notice of relocation, cease to have any interest in the mine. Strange v. Ryan, 46 Cal. 33.

† A party who insists upon a forfeiture or abandonment, and relies thereon to build up a right in himself to the thing, franchise, or easement forfeited or abandoned, is, upon first principles, bound to establish the fact or facts upon which his asserted claim or right depends. Doak v. Brubaker, 1 Nev. 217.

his co-claimants have failed to contribute their *pro rata* share of the amount required by law to be expended annually, the applicant must file with his application for patent and other proofs, a copy of the original notice of location, an abstract of all transfers thereunder, and proofs that provisions of the fifth section of said mining act of May 10, 1872, were fully and strictly complied with by the party or parties who had made the required expenditures and improvements, and given notice thereof in due form to their co-claimants who had failed to contribute.*

The proof in cases of abandonment and notice to co-claimants must be clear, positive, and in strict compliance with the statutes. * * *

Very respectfully,

U. J. BAXTER, *Acting Commissioner.*

In regard to relocations.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 27, 1879.

Register and Receiver, Sacramento, Cal.

GENTLEMEN: Mineral entry No. 630, lot No. 49, made in your office, August 7, 1878, by John Smith upon the Smith quartz mine, Greenwood mining district, is suspended for a duly certified copy of the mining laws of said district in force at date of location of claim, to wit, June 2, 1877.

From an examination of the papers in this claim it appears that Smith's location is in fact a relocation of the premises. If applicant relocated as the *owner* he must furnish a duly certified copy of the original location, with certified abstract of title showing such ownership at date of his relocation.

If his relocation was based upon the abandonment of a prior locator, applicant should furnish proof of such abandonment by affidavits of himself and other credible parties who are personally acquainted with the facts. Such affidavits should state the fact with all possible particularity,

* Where a forfeiture of an interest in a mining claim for non-payment of assessments is claimed, under an agreement entered into by all the tenants in common forming the same, the parties claiming the benefit of the forfeiture must show an exact compliance on their part with all the conditions in the agreement, or they will not be entitled to the forfeiture. Wiseman v. McNulty, 25 Cal. 230.

giving dates of occupation and abandonment with circumstances attending the same.* Respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 11. Hearing ordered to establish identity of claim with location.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 15, 1880.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: A re-examination of mineral entry No. 334, made November 23, 1878, by Frank H. Dyer and Amos K. Smith, upon the Tilden Lode, together with the protest of John J. Jackson, John Olson, John Busick, and Henry Dalstrom, develops an uncertainty relative to the survey of the claim upon which patent is sought by applicants.

Making no reference to the charges of bad faith and fraudulent procedure made against Amos K. Smith, I find it alleged by complainants, in substance, that the survey of said claim, No. 171, was not for the land originally located. It is asserted that the original claim was plainly marked upon the surface by stakes set at the time of location, and that said stakes were shifted some four hundred feet from their original location, and thereby threw the claim in conflict with the Harriet claim, which is upon a totally different lode than the Tilden proper, which was located, as alleged, parallel with the Harriet; and that the Tilden was so changed by survey from its original position as to leave no trace of identity.

It is also alleged that five hundred dollars expenditures have not been placed upon the claim by applicants, as required by law, to entitle them to make application for patent.

The Carriboo Lode was located May 23, 1874, and the same ground was relocated June 13, 1876, as abandoned property, under the name of the Tilden Lode. The locus of the claim is described in the location notice as follows, to wit: "The said Tilden Lode being situated about one fourth of a mile south-west from the mouth of Cottonwood Gulch, and about one thousand two hundred feet north-west of the spring above Stacy Williams' house, in Carr Fork, in

* Mining customs to be construed strictly against forfeiture. Coleman v. Clements 23 Cal. 248.

West Mountain Mining District, Salt Lake county, Utah Territory, and running seven hundred and fifty feet north-easterly, and seven hundred and fifty feet south-westerly from the Notice Monument and Discovery Shaft, and one hundred feet on each side of the vein and along its course to the extent of this location, with all its variations."

Sec. 2324, U. S. Revised Statutes, provides that, "The location must be distinctly marked on the ground, so that the boundaries can be readily traced. All records of mining claims, hereafter (May 10, 1872) made, shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim."

It is manifest from the description given in the location notice above recited, that while the general locality of the claim is described, absolute identity of claim could not be known from the data given therein.

It is true that affidavits alleging the identity of the survey with the location are submitted; but affidavits directly to the contrary have also been filed; and it is my duty, before issuing patent upon any mine, to be satisfied that the land sought to be patented is covered by the location on which the application for patent is based, and no patent can issue for a claim any part of which is outside its location.*

It is also necessary, when any want of certainty in description is found in the papers, that the absolute identity of the claim be established to the satisfaction of this office. You are, therefore, hereby directed to forthwith give notice, by publication for thirty days as specified in instructions on page twenty-six of the inclosed circular, and also by personal notice to the applicants for patent, for a hearing to determine the aforesaid questions relative to the amount of expenditure on the Tilden lode, and the identity of survey No. 171 with its location.

No expenditures made by the Carriboo locators or owners, and none made by any person or persons except under the Tilden location, can be considered.

* When the location of a mining claim is made both by posting notice and reference to natural or permanent objects, witnesses are not confined in their testimony to a statement of the contents of the notice, but may also state whether the location included the ground in dispute. Kelly v. Taylor, 23 Cal. 11.

You will receive any testimony which may be offered by any parties who present themselves as witnesses; and endeavor by careful inquiry to clearly develop the facts concerning the points in question.

The complaint of the Harriet lode claimants, including affidavits on the questions recited, is herewith inclosed.

You will return the same with the record of the hearing.

Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 12. ACT OF 1866. MINERS' RULES OR CUSTOMS.

a. May be altered or amended.

b. Claim must conform to law at date of location.

c. May relocate claim in conformity with amended law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 25, 1871.

E. J. MARSTERS, Esq., *Columbia, Cal.*

SIR: In reply to your communication of the fourteenth inst. I have to state that the acts of Congress limit the right to apply for and receive patents for mining claims to those who have occupied and improved their claims in accordance with the *local laws, customs, and rules of miners.*

In the absence of any State or Territorial enactment regulating the occupancy and possession of mining claims, miners may alter or amend the laws of the district, but this action will not affect claims already located, as a claim must conform to the laws in force at the date of its location.

Should the miners deem it advisable to amend their district laws, they may relocate their claims under and conformably to such amended laws, and upon complying with the acts of Congress and the instructions of this office, may enter and receive patents for the same.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 13. ACT OF 1866.

Construction of first and second provisos to fourth section of Act of July 26, 1866.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 27, 1872.

Hon. A. A. SARGENT, M. C., *House of Representatives.*

SIR: In response to your inquiry in letter of twenty-

fourth instant, inclosing a letter from Hartson and Burnell, dated at Napa City, Cal., the eleventh instant, I have the honor to state, the construction which this office had placed upon the first and second provisos to the fourth section of the mining act of July 26, 1866, was that the limitation of claims in the aggregate to three thousand feet on a lode, to any person or association, was wholly prospective, and related entirely to claims taken up *after* the date of said act, leaving the parties who held the possessory right to claims *previously* located, although in excess of that maximum, at liberty to apply for and receive patents therefor.

Patents not issued in excess of three thousand feet, along vein or lode.

In the case of the New Idria Mining Company, the acting Secretary of the Interior, concurring in the opinion of the Assistant Attorney-general, failed to coincide with this office in its interpretation of the law upon this point, and I am therefore unable to issue patents conveying more than three thousand feet along the vein or lode, no matter whether the location thereof was made prior or subsequent to the date of the mining act of July 26, 1866.

It is understood, unofficially, that it is intended by certain parties in interest, to present a case involving this question before the Hon. Secretary of the Interior for review. The letter of Messrs. Hartson and Burnell is herewith returned.

I am, sir, very respectfully,
Your obedient servant,
WILLIS DRUMMOND, *Commissioner.*

No. 14. ACT OF 1866.

Under Act of July 26, 1866, effect of local law upon the consolidation of two or more locations.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, November, 6, 1869.

THOMAS LYTLE, Esq., *Treasure City, Nevada.*

SIR: Referring to the subject of your letter of the twenty-third of September last, in which you inquire if ten men can "locate 200 feet each on a ledge, one or two of them buy out all the rest, and then apply and secure a patent for

all the ground, by showing title by deeds," I reply: * * The only question for consideration is, whether it would be sanctioned by the mining regulations of Nevada. If a purchase made in the manner you suggest is good under the mining regulations of Nevada, it is good in the General Land Office, provided the one thousand dollars expenditure has been made upon it as required by the mining act.*

Very respectfully, etc.,

JOS. S. WILSON, *Commissioner.*

No. 15. 1. The mining act of May 10, 1872, designed to save claims previously located, with the surface ground to which they were then entitled under previous laws.

2. A claim of three thousand linear feet, with surface ground of fifty on each side the lode, can not, subsequent to the act of May 10, 1872, be relocated for more than one thousand five hundred feet along the lode with additional width of surface ground.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 18, 1879.

Register and Receiver, Fair Play, Colorado.

GENTLEMEN: I have considered the application for review of the decision, in the case of mineral entry No. 112, Peerless lode.

On the twelfth day of October, 1871, Henry Seymour and thirteen other persons located three thousand linear feet of the Peerless lode, with surface ground fifty feet wide on each side of the vein; this being the maximum amount, as to length of lode and width of surface allowed by the laws then in force.

The act of May 10, 1872, provides that locations subsequently made, shall be only one thousand five hundred feet in length, with surface ground not to exceed three hundred feet in width on each side of the vein.

On the twenty-eighth day of January, 1875, the Colorado Mineral, Mining, and Smelting Company, which had by a chain of conveyances from the original locators acquired the possessory rights to the premises, located one thousand

*The word location, as found in the written laws of White Pine mining district, refers to the aggregate of ground claimed as a mine, and not to the interest of a single tenant in common, nor to any specific number of feet or section of the mine. Leet v. John Dare S. M. Co., 6 Nev. 218.

five hundred linear feet of the lode, with surface ground one hundred and seventy-five feet wide on each side of the vein.

December 28, 1875, said company conveyed the premises to the applicant, who, on March 10, 1876, relocated the three thousand linear feet, with surface ground three hundred feet wide on each side of the vein.

On the thirteenth day of December, 1878, the acting commissioner of this office decided that the applicant is not entitled to over one thousand five hundred linear feet of said lode.

Applicant asks a review of this decision, for the alleged reason that the same was based on the acts of Congress of July 26, 1866, and of May 10, 1872, without reference to the act of the territorial legislature of Colorado, approved February 13, 1874, section thirteen of which act is claimed provides that any locator of a mining claim previously made, may enlarge his surface boundaries by filing a certificate of relocation.

If the location of January 28, 1875, had relocated the entire three thousand linear feet, with additional surface width, the question might arise whether the legislature of Colorado can and has undertaken to give a mining claim made prior to the act of 1872, a greater width than that permitted previous to that act.

Mining claims, whether made before or after the act of 1872, must conform to the provisions of the acts of Congress in force at the time the locations were made, and also to the laws of the State or Territory in which said claims are situated, so far as such local laws are not inconsistent with the acts of Congress. The act of 1872 intended by its provisions to preserve to the owners of mining claims whatever rights they had acquired by locations under former laws, but not to enlarge such claims, also to define the rights which might be acquired by subsequent locations.*

Any local laws subsequent to the act of 1872, that attempted to enlarge the claims located prior to that act, beyond what was allowed by the laws in force when the location was made, and at the time of the adoption of the act of 1872, would be inconsistent with the acts of Congress, and would therefore be nugatory.

* Eureka v. Richmond, 4 Sawyer, 302.

But the location of January, 1875, was not an effort to secure to the claim as previously located, a greater width of surface. It was an abandonment of all of the original claim not covered by the relocation of one thousand five hundred linear feet. It was competent for the owner to abandon the original location and make a new location under the law of 1872. If, after he had made the location of 1875, any attempt had been made to confine him to the limits of the original location, he could have availed himself of the relocation.

The relocation of March 10, 1876, of three thousand linear feet was in violation of the act of 1872, which limited all subsequent locations to one thousand five hundred feet. Applicants must claim under the law of 1866 or 1872. If under the act of 1866, his surface width must not exceed what was allowed under the provisions of that act; if under the act of 1872, the length of his claim must conform to this act; but his claim violates the act of 1866, in being wider than was allowed under the provisions of that act and the local regulations authorized by it; and it violates the act of 1872, in exceeding the length permitted by that act, and, therefore, violates both acts. When the act of 1872 took effect, the owner of this claim was entitled, under the laws then in force, to only three thousand by one hundred feet, equal to three hundred thousand square feet. The act of 1872 limited all claims thereafter located to one thousand five hundred by six hundred feet, equal to nine hundred thousand square feet; yet the affidavit in this case claims three thousand by six hundred feet, one million eight hundred thousand square feet, which is six times more than the quantity allowed by the laws prior to the act of 1872, and twice as much as is fixed as the utmost quantity allowed since the act of 1872.

A territorial act is cited as authority for this attempt to set at naught the limitations which Congress has prescribed for mineral claims. It is hardly necessary to cite authorities to show that no Territorial or State legislature can thus nullify the acts of Congress.

As the location of 1876 embraces all that was included in the location of 1875, nothing was abandoned by the location of 1876, and no reason appears why the location of 1875 is not still valid.

The former decision made in this case by the acting commissioner appears to be correct, and, therefore, will not be changed.

You will notify the applicant of this decision, and allow him sixty days from such notice in which to appeal.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

A few decisions cited and some remarks on the subject of location.

In the Eureka v. Richmond case (4 Sawyer, 302), it is held that the statute requiring the end lines of a location to be parallel to each other, is merely directory, and no consequence is attached to a deviation therefrom. The present practice of the Land Office is to require all surveys for patent of locations, under the act of 1872, to show parallel end lines. It would therefore appear that while for the purpose of maintaining or defending an action for the possession of a mining claim, a deviation from this provision of the law might not be material, yet for the purpose of securing a patent from the United States, a survey must be made within the location, which will indicate a compliance therewith.

In the case of Patterson v. Hitchcock (3 Cal. 533), the court held: "The principal lode constitutes the measure of the miner's right to the surface ground, as the surface ground when thus determined in turn constitutes the measure of his right to other veins, lodes, and ledges, subject to the express limitations of the law. It follows, therefore, that if the lode located terminates at any point within the location, or departs at any point from the side lines, the location beyond such point and to that extent is defensible, if not void."

The survey of a mining claim for the purpose of applying for a patent from the United States, is the act of the claimant, and not of the government, and if he has applied for patent before sufficient development has been made to show the strike of his vein, and if thereupon after the patent issues the vein is found to depart from the survey lines, it is lost to the patentee. The surveyor acts for the claimant, and he is not required either to discover or show the course of the vein. Wolfly v. Lebanon M. Co., 4 Colorado, 112; Mining Co. v. Tarbet, 8 Otto, 463.

In the case of Golden Terra Mining Co. v. Maher et al., First Jud. Dist., Dakota, it was held that the spirit of the act (of May 10, 1872) of Congress is to require as a condition precedent to a location of a mining claim, that a discovery of a vein, bearing valuable minerals, shall first be made within the limits of such location, independent of any other subsisting and valid location. It is unappropriated public land, the lands belonging to the United States, in which valuable mineral deposits are found, that are open to exploration, etc. That the vein is discovered when there is discovered a well-defined body of rock in place carrying gold, which body afterwards proves to be continuous. Before a quartz claim can be legally located, a lode must be discovered, and "before such discovery can be called a discovery, at least one well-defined wall or side of the lode must be found." Foote v. National M. Co., 2 Mont. 402.

In Mining Co. v. Collision et al. (5 Sawyer, 439), the court defines a mining claim to be that portion of the public land which the miner takes up and holds, in accordance with mining laws, local and statutory, for mining purposes, and the term includes the vein specially located, all the surface ground located on each side of it, and all other veins or lodes having their apex inside the surface lines.

Again, a mining claim is a piece of land supposed to contain in its soil or rock, gold or other precious metal. McKeon v. Bisbee, 9 Cal. 137. Land must be marked out and taken possession of before it can be called a mining claim. Mallett v. Uncle Sam Mining Co., 1 Nev. 194.

Possession.—A mining claim must be in some way defined as to limits before the possession of or working upon part gives possession to any more than the part so possessed or worked. But when the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is possession of the entire claim. Attwood v. Fricot, 17 Cal. 42.

CHAPTER III.

APPLICATION FOR PATENT.

No. 1. An appropriation of the premises.

No. 2. Publication of notice of application must be made in a newspaper published nearest the claim.

No. 3. Publication must be continuous in one newspaper.

No. 4. Board for equitable consideration will not confirm case falling out of rule stated in No. 3.

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No. 6. An applicant, under the provisions of the mining law, not restricted to one claim.

No. 7. *a.* An application by one joint owner recognized.
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d. Non-concurrence in decision of predecessor in Antelope case.

No. 8. *a.* Application for patent can not proceed until all persons claiming a right are in condition as to citizenship to receive title.
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No. 9. Several lode claims, separate in inception, should not be embraced in one application for patent.

No. 10. Construction of section 2324, Revised Statutes.

No. 11. Lode and placer claims, when separate premises, should not be included in one application.

No. 12. *Nunc pro tunc* proceedings allowed in absence of protest or adverse claim.

No. 13. Act of January 22, 1880, does not change manner of proving citizenship.

No. 14. Montana, under act of Territorial Legislature, locator entitled to fifty feet on each side of lode, in addition to width of lode.

No. 15. Affidavits required of claimant in an application for patent.

No. 16. Act of 1866. Diagram and notice must be drawn to give notice.

No. 17. Claim in two land districts.

No. 18. Aliens.

No. 19. *a.* The judgment of a court on question of abandonment, not conclusive.
b. The supervisory power conferred on the Commission of the G. L. O. sufficient authority to order hearings.

No. 20. Manner in which certificate should issue on application of incorporated company, and by association of persons not incorporated.

No. 21. *a.* In case of discrepancy in name, identity must be proved.
b. Proof. Full copies of conveyances not necessary.
c. Claimant who is to make affidavit of posting, etc.

No. 21. *d.* Citizenship. Locators should possess qualifications of, or have declared their intention to become citizens.

Application should state amount of surface ground to be included in entry, and should agree with published notice, plat, etc. See No. 18—Surveys.

Person out of possession can not apply for patent. See No. 1—Annual Labor.

No. 1. Effect of application.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., June 29, 1875.

SIR: I have considered the application of the Sapphire Silver Mining Company for patent for the "Great W. mining claim," embracing one thousand feet on the Dios Señor or Mount Hope lode, Carson City district, Nevada, which is resisted by the Daney Gold and Silver Mining Company, owning the Mammoth lode.

The Mount Hope claim was located August 5, 1866, by five citizens of the United States, each taking an undivided interest of two hundred feet, one thousand feet in all, along the course of the lode, together with surface ground two hundred feet wide.

Their title has since passed by regular mesne conveyance, to the Sapphire Silver Mining Company named above. After full preliminary compliance with the local rules and customs of miners, State and United States laws, application for patent was made October 16, 1866. The notice and diagram were duly posted on the claim and in the register's office, and the notice published the required length of time and no adverse claim filed. The application was not further pressed until June 19, 1874, when, on the application of said company, it was permitted to make entry of the premises. June 23, 1874, said company surrendered their duplicate receipt to your office and asked that patent issue to them.

June 15, 1874, the Daney Gold and Silver Mining Co. filed an adverse claim and protest against the application for patent, alleging conflict to the extent of two hundred and fifty-eight feet in length by one hundred feet in breadth on the northern part of the Sapphire Co.'s claim.

The notice and diagram of the Sapphire Co., which the Daney Co. claim are insufficient, are more definite than the

great majority of like instruments, and are, I think, good and sufficient, and meet all the requirements of the law.

The objection to the recording of the notice of location is not well taken. The recording was sufficient under the mining act of Nevada, then in force.

The last and principal point made by the Daney Co. is that from the date of application for patent in October, 1866, and certain proceedings in that connection in January, 1867, until application to purchase and entry in June, 1874, the Sapphire Co. had abandoned their claim, and that it was forfeited under the local rules and regulations, and subject to relocation and to the Daney Co.'s location.

The long delay in making entry is a circumstance entitled to some weight, and if it had been persisted in after the company had been required by your office to proceed in the completion of title, and in the presence of an adverse claim, it might be considered as a waiver of all claim, and the application set aside and the premises again thrown open to relocation and occupation.

An appropriation of the premises.

But I think until some such proceeding is had, a *bona fide* application for patent under the act of 1866, is such an appropriation of the premises embraced therein as takes them out of the operation of the local laws. No forfeiture in this case can be claimed under the fifth section of the act of 1872, for the time for the annual expenditure of labor and improvements has been extended to January 1, 1875.

But the Sapphire Co. denies that it has abandoned its claim, and asserts that it and its grantors have been in the open and notorious possession of the claim from its location to the present time.

But parties file affidavits in support of their respective claims. I do not think that the charge of abandoment is sustained.

The facts, which are recited at length by you in your decision of November 23, 1874, show such compliance by the Sapphire Co. with the requirements of law as entitle it to a patent as claimed.

Your decision to this effect is affirmed, and the papers in

the case transmitted with your letter of February 9 last are herewith returned.

Very respectfully, C. DELANO, *Secretary.*

The Commissioner of the General Land Office.

No. 2. Publication of notice of application for patent.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., December 1, 1876.

SIR: I have considered the appeal of S. H. Foley et al., from your decision of May 12, 1876, adverse to their claim in the matter of the application for a patent for the Omaha Quartz Mine, Sacramento, California.

The protestants state that the point upon which they rely in the appeal "is as to the sufficiency of the publication," or the failure to comply with the law in the matter of publication of notice.

The notice was published in the Nevada Transcript, a paper published in Nevada City, a town situated about six miles from the mine, and the publication was made by direction of the register. It appears that in Grass Valley, a town situated about two miles from the mine, two papers are published, a daily and a weekly. It is contended that the notice should have appeared in a paper published nearest the claim. You held that the publication was sufficient.

The sixth section of the act of May 10, 1872, provides that the register of the land office "shall publish a notice that such application has been made, for a period of sixty days, in a newspaper to be by him designated as published nearest to said claim."

It would seem that the intention of Congress was plain that the notice should appear in a paper published at a point indicated, and the register is authorized to designate said paper, following the plain instructions of the statute, which would seem to point out his duty. In this case, however, he has exercised his discretion, disregarded the papers published at Grass Valley, and selected another.

Must be in newspaper published nearest the claim.

I see no warrant for the exercise of this discretion. Under the provisions of the statute the public have a right to look to the paper issued nearest the claim as the one in

which a notice of application for a patent should appear. If any discretion is allowed a register, where shall it be limited? If he may ignore a paper published two miles from a claim, and designate one published six miles distant, he may designate one published at a much greater distance. This question would not have arisen, had the register performed what I think was clearly his duty, and the instructions of your office should be made so explicit as to allow no opportunity for the question to arise in the future. If two or more papers of repute are published equidistant, or very nearly so, from the claim, the register must designate the one in which the notice shall appear; but in other cases the paper published nearest the claim must be designated, provided the same is a reputable newspaper of general circulation.

In the case under consideration, it does not appear that the applicants are in any manner at fault, and to reject their application, when they have in good faith complied with the law and the instructions given them by the local officers, would be a hardship.

I can not, however, recognize the action taken as a strict compliance with the law, and the case is returned to be submitted to the board of confirmation for its action, as your action rejecting the adverse claim of Foley et al. is approved for the reasons given. Your decision is modified accordingly, and the papers transmitted with your letter of August 31, 1876, are herewith returned.

Very respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

No. 3. Publication of notice of application for patent in one newspaper, a portion of the legal period, and a portion in an entirely different newspaper, not a compliance with law; and the parties required to commence *de novo.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, November 12, 1873.

Register and Receiver, Sacramento, California.

GENTLEMEN: This office has examined the papers in case of the application of Michael McBride for patent for the Secret Canyon quartz mine, California.

It appears that this application for patent was filed in

your office, on the third October, 1872, and that thereupon the Register ordered the notice of such application to be published for the period of sixty days, in the Stars and Stripes, a newspaper published at Auburn, California.

By the affidavit of John R. Winders, it appears that said notice was published in the Stars and Stripes, for the period of forty-nine days, to wit: from the tenth October to the twenty-eighth November, 1872.

It appears that the same notice was published in the Placer Herald, a newspaper published at Auburn, California, from the seventh to the fourteenth day of December, 1872.

The mining act of May 10, 1872, makes it the duty of the Register of the land office, upon the filing of an application for patent for a mining claim, to "publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim."

In the case under consideration, the notice was published in one paper for a portion of the sixty days, and in another paper the notice was published fourteen days.

This office is only authorized to issue patents for mining claims, in cases where the mining acts have been strictly complied with.

The mining act provides that the notice shall be published in a newspaper to be designated by the Register as published nearest to the claim, in order to give all parties proper and sufficient notice that such application has been made, to the end that persons holding interests which would be adversely affected by the issuance of the patent as applied for, may file adverse claims, if they desire to do so.

The notice of intention to apply for a patent in this case, was not published in accordance with the law, and no patent can issue upon the application as it now stands, and said application is accordingly rejected.

You will inform the applicant that it will be necessary for him to commence *de novo*, and proceed with his application, in accordance with the law and instructions. Of course, no new survey will be required. * * *

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 4. Publication of notice of application for patent.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., June 3, 1874.

SIR: I have considered the abstract No. 1, of mineral cases, submitted with the letter from your office of February 18, last, for the action of the Board of Confirmation, under the acts of August 3, 1846, and June 26, 1856; being the claim of Michael McBride to a certain tract of mineral land in the Sacramento district, California.

Must be made continuously in one newspaper.

It appears, from the statement on the abstract, that notice of this claim was published in one newspaper for the period of forty-nine days, and in another for the remainder of the sixty days required by the sixth section of the act of May 10, 1872.

This is not, in my judgment, such a substantial compliance with the provision of the act as to properly bring it within the equitable jurisdiction of the board. I am, therefore, constrained to return the abstract without my approval.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. S. S. BURDETT, *Commissioner General Land Office.*

No. 5. Publication of notice of intention to apply for a patent on a mining claim must not be made *without* the knowledge of the Register of the land office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 7, 1874.

Register and Receiver, Central City, Colorado:

GENTLEMEN: I have carefully examined the papers in the case of the application of J. B. Lewis, for patent for fourteen hundred linear feet of the Cascade lode, Cascade mining district, Clear Creek County, Colorado.

This application was filed in the local office on March 20, 1873, and the notice published in the Daily Colorado Herald on the same day, and thereafter for the period of sixty days.

The mining act of May 10, 1872, provides for the patent-

ing of mining claims, and clearly sets forth the manner of proceeding to obtain government title.

One of the conditions precedent to obtaining patent for a mining claim is, that "the register of the land office * * * shall publish a notice that such application has been made for the period of sixty days in a newspaper, to be by him designated as published nearest to said claim."

In the case under consideration it appears by the sworn statement of S. P. Lathrop, who was register of the Central City land office at the date of the filing of said application, "that on the second day of March, 1873, during his absence from said office, John B. Lewis filed in said office an application for patent for the Cascade lode, situated in Cascade mining district, Clear Creek county, Colorado Territory; that, without the knowledge and authority of affiant, the receiver of said land office caused a notice of said application to be published in the Colorado Herald instead of the Georgetown Miner, in which, to the best of my knowledge and belief, it should have been published."

By the affidavit of Francis F. Brunė, deputy mineral surveyor for said district, it appears that the premises described in the application for patent are about four miles from Georgetown, and about twelve miles from Central City.

Publication of notice.

From the foregoing it will be seen that the notice was not published in accordance with the law, having been published without the knowledge of the register, and not in a paper published nearest the claim.

The register has been accustomed to publish the notices of applications for patents for mining claims situate in Cascade district, Clear Creek county, in the Colorado Miner, which is published near to said district and within the county, and parties owning claims in that district had a right to expect that notices of intentions to apply for patents for mines in said district would be published in the Colorado Miner, and not in a paper published in another county and at a much greater distance. * * * *

Very respectfully,

W. W. CURTIS, *Acting Commissioner.*

No. 6. Not restricted to one mining claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Sept. 21, 1872.

JOHN G. IRWIN, Esq., *Weaverville, Trinity County, California.*

SIR: In response to your inquiry of the sixth instant, I have to state that the mining statute does not restrict a party to one patent, but gives the right to proceed to procure government title to as many valid mining claims as he may have the possessory right to under local laws, and upon which the necessary amount has been expended in labor or improvements. Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner.*

No. 7. 1. Acts of co-owner and attorney.
2. Effect of abandonment of surface conflict upon adverse claim.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY, January 3, 1877.

SIR: I have considered the appeal of George R. Ayers and Isaac S. Waterman, claimants of Sacramento Lode, from your decision of June 17, 1876, allowing a patent to issue for the Last Chance No. 2 Mine, Marcus Daly and John Cassin applicants, situated in Ophir Mining District, Utah Territory.

Daly and Cassin applied for a patent March 6, 1875, and during publication of notice, viz., on the fifth of May, 1875, Ayers and Waterman filed an adverse claim, and on the twenty-ninth of the same month commenced suit in the District Court of the Third Judicial District of Utah.

The first and second objections raised by the adverse claimants in their appeal, viz., that the application for a patent, signed by Daly only, for himself and Cassin, the joint owner, was not a legal application, no authority to sign for Cassin being shown, and, secondly, that the abandonment of the surface ground in dispute, filed by Shellabarger and Wilson, attorneys for the applicants, can not be treated as an abandonment by the applicants, as no authority from them to so act is shown by the attorneys, raise points involving questions of office practice, and are not vital in the consideration of the case.

Application by one joint owner recognized.

The practice of your office has been to recognize an application for a patent signed by one joint owner, in behalf of himself and the remaining joint owners, in the absence of alleged or apparent fraud. The practice is one of great convenience to the applicants, and is based upon law and reason.

Acts of attorney in legitimate prosecution of case recognized.

The practice of the department has also been uniform in regarding the acts of recognized attorneys, performed in the legitimate prosecution and adjudication of cases, as the acts of the claimants themselves. This practice is based upon custom and principle, and I see no reason to change or modify the same in the absence of either alleged or apparent fraud. In my opinion, no substantial reasons are assigned why the rules so long and uniformly practiced in your office should be changed, and the application declared illegal, and the abandonment a nullity.

An abandonment of surface conflict does not relieve the necessity of a stay of proceedings in the Land Department.

You hold that, by reason of the abandonment, "no necessity exists for a further suspension of proceedings upon said application for patent." In view of the provisions of section seven of the act approved May 10, 1872, I think this conclusion was erroneous. In accordance with the provisions of that section, Ayers and Waterman filed an adverse claim upon oath, showing the nature, boundaries, and extent of said claim, and commenced suit. The possession of the surface ground in dispute may be of the least importance—a mere incident. Other and far more important questions may be involved—the location of the lode, for example; and to allow the defendants to obtain the advantage to be derived from the possession of a patent from the Government, simply by filing in your office an abandonment of said surface ground, would, in my opinion, be an evasion of both the intent and letter of the law.

The terms of the act are explicit: All proceedings, except the publication of notice and making and filing of the affidavits thereof, shall be stayed until the final adjudica-

tion of the case by the authorized tribunal, or a waiver of the adverse claim.

The provision of the law, that in case two lodes intersect, the prior location shall be entitled to the ore or mineral contained within the space of intersection, does not, in my opinion, release the Department from the duty of abstaining from all further proceedings in the case, or justify the issuing of a patent embracing the premises in controversy, with the exception of the immaterial portion abandoned by the applicants, viz., the surface ground. I think it is clear that it was the intention of Congress to refer *all* questions arising from a conflict of claims, when a suit is duly commenced, to a court of competent jurisdiction, in the possession of the power necessary to ascertain the truth and facts relating to the same, a power not possessed by this department; and, if so, it is the duty of your office to refrain from any act that would in any manner interfere with the adjudication of such controversy.

Non-concurrence in decision of predecessor in the "Antelope Lode" case.

Reference has been made by the attorneys for the applicants to the decision of my predecessor dated April 1, 1875, in the matter of the application for a patent for the "Antelope Lode." After a careful consideration of the case now before me, I am unable to concur in the views expressed in that decision, or to arrive at a conclusion other than that requiring a suspension of all proceedings before this Department during the pendency of the suit.

This decision is in accordance with the views expressed by me on the twenty-sixth ultimo, in the matter of an application for a patent for the "King of the West" mine.

It follows that your decision must be reversed, and all proceedings in the case suspended until the final determination of the same by the court, or a waiver of the adverse claim in due form, or by a failure to prosecute the suit with reasonable diligence. The papers transmitted with your letter of September 5, 1876, are herewith returned. Very respectfully,

Z. CHANDLER, *Secretary.*

The Commissioner of the General Land Office.

No. 8. 1. An application for patent can not proceed until all persons claiming a right are in a condition, as to citizenship, to receive title.
2. Effect of naturalization.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 18, 1876.

Register and Receiver, Carson City, Nevada.

GENTLEMEN: On the twenty-seventh of May, 1875, an application for patent for four hundred linear feet of the Lady Allen vein or lode was filed in your office.

This application was sworn to before the register on the twenty-seventh of May, 1875, by William S. Wood, one of the applicants for patent, the others being G. W. Deys, J. P. Sweet, Jacob Smith, Levi Chapman, and Jno. B. Gallagher. It appears from a certified copy of the location notice that W. W. Elliot and one other located four hundred feet of the Lady Allen lode—Mary Ann Co.—on the eleventh of July, 1863, and made record of such location.

The abstract of title is incomplete. In the sworn statement of W. S. Wood, he refers to certain deeds made previous to the year 1870, which, "although properly executed and delivered, were not recorded, and were, as deponent is informed and believes, destroyed by fire in the town of Silver City, Lyon county, in the year 1870," and alleges that said applicants "have become the owners of, and are in the actual, quiet, and undisturbed possession of," said premises. It is shown, however, by the abstract of title from the office of the recorder of Lyon county, Nevada, that J. P. Sweet, one of the applicants, conveyed by quitclaim deed, dated May 19, 1875, fifty feet in said claim to John Henry, and that this deed was recorded May 26, 1875, in the recorder's office.

In an affidavit on file with the case sworn to by W. S. Wood, on the first of March, 1876, before the register, Mr. Wood alleges that "he is informed by said John Henry, and the deponent verily believes that said John Henry is an alien, and a subject of Great Britain; that deponent has frequently requested said Henry to make declarations of his intention to become a citizen of the United States, in order that said application for patent might proceed; but the said Henry has constantly, and does now positively,

refuse to make any such declaration, but still continues an alien, and declines and refuses to take any step toward becoming a citizen of the United States."

"Deponent further says that by reason of the facts aforesaid, the applicants are unable to present any abstract of title showing a right in them to all of the mining claim aforesaid, and that the undivided fifty feet thereof stands in the name of said John Henry."

It is urged by the attorneys for the applicants for patent that an alien is incapable of acquiring a patentable interest in a mining location, and that the "attempt of Sweet to convey to Henry what the law prohibits the latter from holding, does not in any way affect the rights of these applicants, the act being void." Said attorneys ask therefore that the patent issue to said applicants.

No patent can issue upon this application as it now stands, as they have no title to the entire premises for which patent is sought.

Naturalization.

It is true that John Henry, being an alien, has no patentable interest in said mine at the present time, but should he become naturalized, his right to a patent upon compliace with the law would be perfect, for "naturalization has a retroactive effect so as be deemed a waiver of all liability to forfeiture and a confirmation of his former title." *Vide* Osterman v. Baldwin, 6 Wall. 116; Jackson v. Beach, Johns. Cas. 401.

It has been held by the Supreme Court of the United States, in numerous cases, that an alien can take by deed, and hold until office found. *Vide* Fairfax, Devisee, v. Hunter, 7 Cranch, 603; Orr v. Hodgson, 4 Wheat. 453; Craig v. Leslie et al., 3 Id. 563; Craig v. Radford, 3 Id. 594; Cross v. De Valle, 1 Wall. 1; Osterman v. Baldwin, 6 Id. 116; Governeur's Heirs v. Robertson, 11 Wheat. 332.

Said application for patent will, therefore, remain suspended until the applicants shall show that they are in a condition to receive patent.

You will inform all parties in interest, and acknowledge the receipt hereof.

Very respectfully, your obedient servant.

J. A. WILLIAMSON, *Commissioner.*

No. 9. 1. Several lode claims, separate in inception, should not be embraced in one application for patent.

2. Ruling of March 26, 1874, reversed.

3. This rule not applicable to placers which embrace several lodes within the boundaries sought to be patented.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 17, 1875.

Register and Receiver, Helena, Montana.

GENTLEMEN: Upon a review of the question I am convinced that several lode claims, separate in their inception, should not be embraced in one application for patent.

The slight saving in expense does not compensate for the delays in furnishing satisfactory proofs in the several claims sought to be patented, and the practice of including several lodes in one application should not be encouraged.

Ruling of March 26, 1874, *reversed.*

I therefore reverse the ruling of this office of March 26, 1874, and direct that *hereafter* you receive no application for patent that shall embrace more than one vein or lode.

Applications now in progress will be perfected under the former rule.

Rule not applicable to several lodes in placer claim.

You will understand that this decision does not apply to placers which embrace several lodes within the boundaries sought to be patented. *Vide* section 11 of the act of May 10, 1872 (Revised Statutes, section 2333), or to consolidated claims on the same vein or lode.

Be pleased to acknowledge the receipt hereof.

Very respectfully, your obedient servant,
W. W. CURTIS, *Acting Commissioner.*

No. 10. Construction of section 5, act of May 10, 1872. Section 2324, U. S. Rev. Stat.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 27, 1872.

HON. C. DELANO, *Secretary of the Interior.*

SIR: * * * * The fifth section of said act of May 10, 1872, provides, among other things, that "on each claim located after the passage of this act and until a patent shall

have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year," and that "on all claims located prior to the passage of this act ten dollars worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor, but where such claims are held in common such expenditure may be made upon any one claim," etc.

Construction.

The only interpretation this office has been able to give to this language is that a "claim" on a lode located *after* the tenth of May, 1872, may be fifteen hundred feet in length and no more, whether located by one or more persons; and that to hold such claim of fifteen hundred feet will require an annual expenditure *thereon* of not less than one hundred dollars, and that on all lodes located *prior* to the passage of said act of May 10, 1872, there must, hereafter, be an annual expenditure of not less than ten dollars for each one hundred feet claimed on the course of the lode, under such prior locations, but that where a number of such claims of one hundred or two hundred feet each, as the case may be, upon the *same lode* are held in common, either by one or more persons, under locations made prior to said act of May 10, 1872, the aggregate amount necessary to hold all the *claims* so held in common upon the *same lode*, at the rate of ten dollars for each one hundred feet, may be expended upon any *one claim* thereon, or, in other words, at any one point on the lode so held in common; the words "where such claims are held in common such expenditure may be made upon any one claim," being held to mean that where several claims are held in common upon the *same lode* the entire expenditure necessary to hold all the claims thereon may be made on any one claim on such lode, but that expenditures made upon any one lode or claim, however great, can, in no way, be made to apply to *other lodes* claimed by the same parties.

In the case referred to by Mr. Douglas it would seem that the Helnuck Silver Mining company are the claimants of nine separate lodes, all of which it is their purpose to de-

velop and improve by a mining tunnel now being run for the purpose of intersecting such lodes below the surface.

If this interpretation of the law is correct, work done and expenditures made in constructing a tunnel *intended* for the development and improvement of lodes will not satisfy the legal requirements as to expenditure as aforesaid; but the required amount of labor or expenditure must be made upon *each lode* claimed, in good faith, otherwise the same will be subject to relocation by other parties as provided by said statute.*

As Mr. Douglas, and those whom he represents, entertain a different view of the law. I respectfully submit the question for the consideration and advice of the head of the department. With great respect, your obedient servant,

WILLIS DRUMMOND, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., September 4, 1872.

SIR: I return herewith the two letters addressed to your office by R. M. Douglas, Esq., of this city, in relation to the proper construction of the fifth section of the mining act of tenth May, 1872, and transmitted with your letter of the twenty-seventh ultimo.

The views set forth in your letter appear to me in entire consonance with the letter and spirit of the act, and are therefore approved. I am, sir, very respectfully, your obedient servant,

W. H. SMITH, *Acting Secretary.*

HON. WILLIS DRUMMOND, *Commissioner General Land Office.*

No. 11. Lode and placer claims when separate premises.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 10, 1879.

HENRY O'CONNOR, Jr., *Deadwood, Dakota.*

SIR: In reply to your letter of thirty-first ultimo, inclosing copy of one dated eleventh of November, asking "whether or not a patent will issue including a placer and ledge claim when said claims are not contiguous, and the

* See act of February 11, 1875. No. 9, Laws.

ledge is entirely without the placer location," you are informed that a placer and lode claim situated as aforesaid can not be embraced in the same patent, or the same proceeding for patent. Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 12. In the absence of adverse claim or protest, the substitution of valid for defective affidavits allowed.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, February 3, 1880.

SIR: I am in receipt of your letter of the twenty-fourth ultimo, transmitting the papers in the case of Mineral Entries Nos. 1 and 2, at Oxford, Idaho Territory, of Arie Pinedo, upon the Soda Springs Sulphur mine.

You held said entries for cancellation on the fifteenth ultimo, for the reason that the oath, under which the application for a patent was filed, together with the affidavit of applicant that the plat and notice of intention to apply for patent remained posted on the claim during the period of publication, and the sworn statement of the fees and moneys paid in the case, were not verified before an officer authorized to administer oaths, in the land district wherein the claim is situated, but were executed and sworn to at Salt Lake City, Utah.

It appears that neither an adverse claim, nor a protest, has been filed in this case. It is *ex parte*, the question being one simply between the applicant and the government, and the proceedings are all regular with the exception above noted.

Nunc pro tunc proceeding.

The applicant now requests that he be allowed to make the affidavits above specified as defective, before the local officers at Oxford. The substitution of said affidavits would be in the nature of a *nunc pro tunc* proceeding. The other proceedings being regular, and in the absence of an adverse claim and of a protest, I see no reason why this request should not be granted, as it will in effect be simply the correction of a mistake made under a directory statute, in which no parties except the government and the applicant are interested, and no rights of other parties are involved.

Your decision is therefore modified, and you will proceed in the case in accordance with the views herein expressed.

The papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 13. CITIZENSHIP.

The act of January 22, 1880, does not change manner of proof.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 10, 1880.

Register and Receiver, Eureka, Nevada.

GENTLEMEN: Mineral entries Nos. 368, 369, 370, and 371, made in your office September 30, 1878, by John C. Phillips, upon the Richmond, Boston, Zealous, and Argonaut mines, are suspended for proper proof of citizenship.

These entries were held for cancellation, the applications for patent having been sworn to by Alexander Tripple, attorney in fact for said Phillips; section 2325 U. S. Revised Statutes requiring that said affidavits must be made by claimant.

The act of Congress approved January 22, 1880, however, has cured this defect, and the proofs in the cases, with the exception of that of citizenship, are sufficient.

Affidavit of claimant must be verified within the land district.

The affidavit of John C. Phillips, claimant, verified at Boston, Mass., before a commissioner for the State of Nevada, is in evidence, but this does not comply with the law, which requires (Sec. 2325, R. S.) that this affidavit shall be verified before a duly qualified officer *within the land district* where the claim is situated.

The claimant need not necessarily adopt this mode of proving his citizenship. Of itself it is the lowest grade of evidence of the fact sought to be established, but the law makes it sufficient, and when properly verified must be accepted by this office as conclusive. It must be made by claimant himself, and verified within the proper land district. The act of January 22, 1880, does not change or relate to the proof of citizenship.

While the law permits this form of proof, it does not

preclude other modes, and citizenship, like any other fact, may be established in accordance with ordinary rules of evidence, but unless verified as required by law, the affidavit of the claimant can not be regarded as sufficient evidence. Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 14. In Montana, under the act of the territorial legislature of December 26, 1874, the locator is entitled to fifty feet on each side of the lode, in addition to the width of the lode itself.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 24, 1876.

SIR: I have considered the appeal of Tootle, Hanna et al., claimants of Stapleton Lode M. E., No. 120, and Tuscarora Lode No. 118, from your adverse decision of May 5, 1876, upon their application for patents for said lodes.

Each of these lodes has been surveyed in due form, with a width of one hundred and twenty feet—twenty feet representing the width of the lode, and fifty feet on either side for working purposes.

These locations were made under the territorial act of Montana, approved December 26, 1864, which provides that "claims on any lead, lode, or ledge, either of gold or silver, hereafter discovered, shall consist of not more than two hundred feet along the lead, lode, or ledge, also fifty feet on each side of the lead, lode, or ledge, for working purposes."

In the case of the "Gem Lode," decided by my predecessor January 22, 1875, this statute was so construed as to limit the width of every lode to one hundred feet, namely, fifty feet on each side of the center of the vein. Following that decision, you deny the application of claimant, and order a survey of the lode, limiting its width to one hundred feet.

Since the decision of my predecessor above referred to, the supreme court of Montana has given construction to the act in question, holding that it authorizes the location and patenting of fifty feet on each side of the lode, in addition to the lode itself.*

* The statute of Montana allowing to discoverers, as the width of their claim, "fifty feet on each side of said lead, lode, or ledge," means fifty feet on each side, in addition to the width of the lode itself. It does not mean from the center of the lode. Foote v. National M. Co., 2 Mont. 402; Frohner v. Rodgers, 2 Mont. 179.

The act being one of the territorial legislature, the construction given it by the highest court of said Territory should be adopted by this department. I am therefore compelled to reverse your decision, and hold that the claimant is entitled to fifty feet on each side of the lode, in addition to the width of the lode itself.

As the width of the lode in these cases appears to be twenty feet, I approve the survey, and direct the patents to be issued pursuant to the application therefor.

The papers transmitted with your letter "N" of June 12, 1876, are herewith returned.

Very respectfully, your obedient servant,

Z. CHANDLER, *Secretary.*

The Commissioner General Land Office.

No. 15. Affidavits required of claimant in an application for patent.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 26, 1879.

Register and Receiver, Eureka, Nevada.

GENTLEMEN: The papers in Mineral Entry No. 371, Lot No. 41, made in your office September 30, 1878, by John C. Phillips, upon the Argonaut Mine, Danville Mining District, have been examined.

A copy of the mining laws of said district in force at the date of location, to wit, June, 1878, will be required.

The affidavits of continuous posting of notice on claim, and affidavit of compliance with mining laws, etc., in application for patent, are made by Alexander Tripple, attorney in fact for claimant. The statute, however, prescribes that these affidavits shall be made by *claimant*, and they can not be made by agent.*

You will, therefore, require claimant to comply with the requirements of the law in this respect, and also to furnish affidavit of citizenship, made before an officer authorized to administer oaths in the land district in which the claim is situate. Respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

* The Act of Congress, approved January 22, 1880, provides that these affidavits may be made by agent when the claimant is not a resident of, or is not in the land district at date of application.

No. 16. ACT OF 1866.

Character of diagram and notice required.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 8, 1871.

Register and Receiver, Central City, Colorado.

GENTLEMEN: It again becomes necessary to call your attention to the fact, that in many cases the mining diagrams and notices are too indefinitely drawn to answer the requirements of the law or instructions.

Must be so drawn as to give notice.

The purpose of the diagram and notice is analogous to a legal summons, by which any and all parties are notified that unless, within a given time, they come forward and defend any right or interest they may have in certain premises, their right to do so shall become barred, and judgment rendered for claimant.

This being the case, you will at once perceive the importance of having the diagram and notice very carefully prepared. * * * An honest claimant will certainly have no hesitation in giving such a description of what he claims, as will enable any neighboring claimants to fully inform themselves of his intentions.

* * * Should it be shown in any of the cases now pending, that parties have been injuriously affected by proceedings under a diagram or notice drawn in a manner calculated to deceive, or throw them off their guard, it will of course be the duty of this office to open the case for investigation, or to reject the claim, and require proceedings thereon *de novo*.

Very respectfully,
WILLIS DRUMMOND, *Commissioner.*

No. 17. Proceedings where application is made for patent on a claim located in two land districts.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 12, 1875.

Register and Receiver, San Francisco, California.

GENTLEMEN: With your letter of the twenty-second ultimo you transmitted certain papers in case of the application

of the Lake Quicksilver Mining Co. for patent for fourteen quicksilver mines and a mill site.

You refused to receive this application for the reason that a portion of the premises described in said application lies within the Marysville land district, and for the further reason that the said mill site is contiguous to the mine.

On the seventeenth of August, 1875, this office, after a careful review of the question, ruled that an application for patent could embrace but one lode or vein, except in cases where placer claims embrace within their exterior boundaries several lode claims. *Vide* Revised Statutes, sec. 2333; sec. 11 of the act of May 10, 1872.

It will therefore be necessary for said company to file fourteen separate and distinct applications for patents.

It is observed that the mill site No. 9 is claimed with Lake No. 9 mine, and that it is not contiguous to said mine; hence the application for patent for Lake No. 9 mine may embrace the said mill site.

It is observed that Lake No. 1 and Lake No. 2 mines lie wholly within the Marysville district, and applications for patents for these mines should be filed in the Marysville land office.

Lake Nos. 6, 7, 8, 9, 10, 11, 12, 13, and 14 mines, and No. 9 mill site, lie wholly within the San Francisco district, and applications for patents for these mines and the mill site should be filed in the San Francisco office.

Lake Nos. 3, 4, and 5 mines lie partly in the Marysville and partly in the San Francisco districts.

Application filed in district where principal workings are situated and notice of application to be posted in both land offices.

In all cases where mining claims lie partly in one land district and partly in another, applications for patents therefor should be filed in that district where the principal workings of the claim are situated, as shown by the plat and field notes; and the diagrams and notices should be posted near to such workings. A copy of the notice and of the diagram should be posted in the register's office in each district.

The notice posted in the office of the register, where the *application for patents is not filed*, should state where the

application for patent for the premises therein described has been filed, and the date of the filing of such application.

You will, therefore, in accordance with the instructions herein contained, allow said company to file their applications for patents; and, upon full compliance with the law and instructions, allow the several entries to be made should no adverse claims be filed.

To the end that the applicants may be to as little expense as possible in the matter of publishing the notices required by law, you will authorize the publication to be made of the several notices of intention to apply for patents for said mines in one advertisement, wherein will be accurately described the premises embraced by each of said applications which may be filed in your office.

This advertisement will of course be published for the period of time required by law, to wit: If published in a weekly paper, the advertisement must be inserted in ten consecutive issues of the paper; but if published in a daily paper, sixty days must elapse between the first and last insertions of said advertisement.

You will inform the applicant for patent of the import of this letter, and acknowledge the receipt hereof.

I return herewith the plat of said claims, forwarded with your letter of the twenty-second ultimo.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 18. ALIENS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 24, 1876.

Register and Receiver, Roseburg, Oregon.

GENTLEMEN: On the twenty-first October, 1875, Jerome B. Coats filed in your office an application for patent for the west half of north-west quarter of south-east quarter, the north half of south-west quarter of south-east quarter, and the south-east quarter of south-west quarter of south-east quarter of section 10, township 38 south, range 3 west, situated in Jackass Creek mining district, Jackson county, Oregon.

Mr. Coats alleges that he came into possession of said

premises by purchase on the twenty-third of September, 1875, from Su Hang, Shi Quong, Wong Chung, Shi Shoon, Ah Woo, and Wong Loong. He does not allege or show that he had any right, title, or interest in said premises previous to the date of said deed from said Chinamen.

No title in mining claims can be held by aliens prior to the issuance of patents therefor.

At the time said aliens claimed said premises they could not, under the law, hold title to the same, and having no authority of law for laying claim to said premises, they could transfer no title to Mr. Coats for the same.*

An assignor can transfer no greater interest to his assignee than he himself possesses.

Aliens can not hold or transfer a valid title to a mining claim prior to the issue of patent.

In case of the application for patent for the Kempton mine, the honorable Secretary of the Interior held that "if, therefore, it appeared in the case that the original locators were not citizens or had not declared their intention to become such at the time their location was made, and that they had not become citizens when they transferred the mine, I should have no hesitation in holding that the transfer was invalid, and the claim of the applicants was not good."

Had Mr. Coats after said purchase made a relocation of said mine, made the required improvements, and otherwise complied with the law, he would have been in condition to apply for a patent. But none of these points are shown or alleged.

Said application for patent is accordingly rejected.

On the thirteenth of December, 1875, and within the sixty days' notice by publication, John Beckner and six others transmitted from Jacksonville, Oregon, by letter, an adverse claim against said application, which was not made out in the form prescribed by law and the instructions of this office, and could not have been considered.

They subsequently filed another adverse claim after the expiration of the publication of notice which could not have been considered had the application been complete. * *

Very respectfully,

U. J. BAXTER, *Acting Commissioner.*

* See case of Golden Fleece Co. v. Cable Con. Co., 12 Nev. 313.

No. 19. QUESTION OF ABANDONMENT.

1. The judgment of a court on the question of abandonment may be taken into consideration as evidence, but is not conclusive. A hearing ordered.

2. The supervisory power conferred upon the Commissioner of the General Land Office gives sufficient authority to order hearings.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, February 19, 1878.

SIR: I have considered the appeal of L. W. Wood et al., from your decision of August 18, 1877, rejecting their application for a patent for the Woodville placer mine, lot No. 43, township 16 north, range 9 east, M. D. M., Sacramento, California.

This tract was located in 1855, and from that time until 1861 worked continuously, and a large sum of money expended in its development.

In 1858 and 1860, C. H. Seymour became, by purchase, the owner of eight twentieths of said mine, known as the Nebraska claim, which interest he now asserts, together with an additional interest of six twentieths obtained from the locators or their grantees.

There is no copy of the local mining laws governing the location and holding of placer claims, in the district wherein the tract in question is situated, filed in the case, by which it can be ascertained whether or not the original locators and their grantees have complied with the local laws and regulations of miners in that district so as to entitle them to the right of possession of said tract, as against adverse claimants. If they have thus complied with the local laws, the land is not subject to relocation by other parties until an abandonment by the original locators is established.

In the application of Wood et al., filed February 24, 1874, the applicants assert that they located the tract on or about December 23, 1873; they also assert that they obtained peaceable possession of the land at that time, and have remained in possession since.

It is contended by them that the location of the Nebraska claim has been abandoned. On the contrary, Seymour asserts that the original locators and their grantees have not abandoned said claim, but have remained in possession of the same according to local laws and regulations.

There is on file in the case a transcript of the proceedings

in the case of C. H. Seymour v. L. W. Wood et al., in the supreme court of California, in which it appears that Seymour brought suit in the district court of the fourteenth judicial district of California, to recover possession of eight twentieths of the ground of the Nebraska mining claim, and judgment was rendered in his favor. The legitimate conclusion to be drawn from this judgment is that the jury found that the original Nebraska location had not been abandoned. In your decision of August 18, last, you held, in substance, that in view of this judgment of the court, the fact was established that the prior location had not been abandoned, and rejected the application of Wood et al. for a patent.

Effect of judgment of court on question of abandonment.

It is competent for the department to take the judgment of the district court of California into consideration, as evidence on a question of fact, but I am of the opinion that its judgment should not be conclusive. Before a correct decision can be rendered in this case, the facts in relation to the abandonment or non-abandonment of the prior location must be determined.

The evidence now on file is *ex parte*, each claimant to the land asserting his superior right thereto, and, as said right must depend upon the facts, you are instructed to order a hearing to ascertain, if possible, the truth in relation to the abandonment of the Nebraska claim.

If the applicants establish the fact that they obtained peaceable possession of the ground, have remained in possession of the same, and have the right of said possession, their application must be recognized. The claim may be defeated by establishing the fact that the ground was not subject to location, and any party has the right, as a protestant, to submit evidence on that point. Should it be established that, by compliance with the mining laws and customs, and regulations, prior locators have the right of possession, the tract can not be considered as subject to relocation, and the application must be rejected. The evidence must be confined to the question of abandonment, and the status of the parties will not be changed by the order for a hearing.

I concur with you in the opinion expressed in your letter of March 22, last, that Seymour can not be regarded as an adverse claimant under the statute, and also in the opinion expressed in your decision of August 18, last, that the publication of the application, although somewhat irregular, was not fatal to the application, as it was a substantial compliance with the law.

Supervisory powers.

A hearing is not expressly provided for in the act of May 10, 1872, but I am clearly of the opinion that it is within your jurisdiction, under the supervisory power conferred upon you by the first section of the act of July 4, 1836, vesting in the Commissioner of the General Land Office control in all matters pertaining to the disposal of the public lands, to order hearings, when it is necessary for the purpose of ascertaining the facts in a given case, without which it is impossible to render an intelligent decision.

Due notice of the hearing should be given to all parties in interest; when the evidence, with the opinion of the local officers thereon, is received, the case should be determined upon its merits.

The papers transmitted with your letter of October 21, last, are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

Commissioner of the General Land Office.

1. When a party abandons a mining claim, he has the right to remove therefrom any ore which he may have extracted, and any machinery or buildings he may have placed thereon.

2. A party relocating an abandoned mine, may sink new shafts, or continue work on such as may have been constructed, etc.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 2, 1876.

L. E. MORGAN, Esq., *Bullion, Elko Co., Nev.*

SIR: * * * Where a party abandons a mining claim, he has the undoubted right to remove from said claim any machinery or buildings which he may have placed thereon, or any ore that he may have extracted from such mine. A party relocating an abandoned mine may, in prosecuting

work thereon, either sink new shafts and run new tunnels, or continue the work upon such shafts or tunnels as may have been constructed by parties who had abandoned the same. Very respectfully,

U. J. BAXTER, *Acting Commissioner.*

No. 20. Manner in which certificate should issue on application of incorporated companies, and by associations of persons not incorporated.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 11, 1873.

Register and Receiver, Carson City, Nevada.

GENTLEMEN: In all cases where incorporated companies apply for patents for mining claims, you will require a copy of their certificate of incorporation, or charter, to be filed with the application for patent.

Where an association of persons unincorporated apply for a patent, the published notice, the Register's certificate of entry, and the Receiver's receipt should give the names of all the applicants.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 21. 1. In case of discrepancy in name, identity may be proved.

2. Full copies of conveyances not necessary. Abstract thereof sufficient.

3. *Claimant,* who must make affidavit of posting of notice and plat upon claim, not necessarily one of the original locators. If assignment has been made, the assignee becomes the claimant.

4. Locators should possess the qualification of citizenship.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., January 2, 1875.

SIR: I have examined the case of Warren Hussey et al., applicants for the Kempton Mine, situated in the West Mountain mining district, Salt Lake county, Utah, on appeal by the Galena Silver Mining Company, from your decisions of September 30 and November 10, 1874. * * *

1. It is objected that it does not appear that B. F. Buck, one of the original locators of the Kempton Mine, has ever transferred his interest in the same.

Names are arbitrary.

The original application for the Kempton patent, which is sworn to by five different persons, alleges that "Samuel

Buck, under the name of B. F. Buck," was one of the original locators, and that the said Samuel had transferred his interest in the mine to John Segus, who was one of the applicants for patent. There is, in the abstract of title furnished, a certificate of the Recorder, of the conveyance from Samuel Buck to the said Segus. I think this is sufficient. Names are arbitrary. Identity is the important matter, and the identity of Samuel Buck with the B. F. Buck, of the location, is satisfactorily shown.

Abstract of conveyances sufficient.

2. It is further objected, that full and complete copies of the respective conveyances, showing title in applicants, are not set forth in the records. It is conceded that brief abstracts of the contests are set forth. Under the rules and regulations, I think this is sufficient. If more should be required the rules should be changed.

Claimant referred to not necessarily one of the original locators.

3. It is also objected that there is no affidavit of the *proper party* that the plat and notice were posted in a conspicuous place on the claim during the period of publication. The sixth section provides that "at the expiration of the sixty days of publication, *the claimant* shall file his affidavit, showing that the plat and notice has been posted in a conspicuous place on the claim during said period of publication." It is argued that the claimant referred to is one of the original locators. I think that this is not necessarily so.

When the original locators make the application for patent, then one of them must make the affidavit, but when the original locators have assigned their interest, and the application is made by the assignees, then the assignees are the claimants, and one of them may make this affidavit. In this case, it was first made by R. T. Anderson, the superintendent of the mine, and afterwards by Colbath, who is one of the present applicants, and is, therefore, one of the claimants, within the purview of the sixth section.

4. It is also objected that there is no sufficient proof that the plat and notice were posted in a conspicuous place on the claim. The objection is not that there was not *a* plat and notice posted on the claim, but that there is no proof *what plat and notice* were thus posted.

The sixth section provides that the applicant for patent shall file in the proper land office, under oath, an application, together with a plat and field notes, of the claim made by the authority of the United States Surveyor-General, "and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to the filing of the application for patent, and shall file an affidavit of at least two persons that such notice has been duly posted as aforesaid, and shall file a copy of said notice in such land office, and shall thereupon be entitled to a patent," etc.

The application for patent in this case alleges "that the notice of intention to apply for a patent, together with a plat of the survey of said mine, was duly posted upon the same on the thirty-first day of October, A. D. 1873, in a conspicuous place, as will appear by the affidavit of W. A. Watson and Henry Curran, herewith submitted, marked Exhibit "E." When the papers reached this department, "Exhibit E" was found in its proper place in the application, but there was found detached from the application an affidavit of W. A. Watson and Henry Curran, marked in red ink "Exhibit E," in the same handwriting in which the other exhibits attached to the application were written. This affidavit stated "that a plat and notice of which the attached are true copies, were posted conspicuously on the Kempton mining claim on the thirty-first day of October, A. D. 1873; that the affiants were present, and saw the same so posted."

There is also found among the papers a plat of the survey of said Kempton mine, certified to by the Surveyor-general of Utah, numbered 19, dated October 1, 1873, and a notice of application for patent, partly written and partly printed, dated October 11, 1873, and in due form. This plat and notice bear physical evidence that they have been attached to the affidavit of Watson and Curran. * * * The evidence of the attachment of the plat and notice amounts to absolute demonstration. * * * The evidence of the attachment of the notice and affidavit is not so complete, but it is quite satisfactory. * * * I entertain no doubt of the fact that a plat and notice, of which those above referred to as a part of "Exhibit E" were either copies or duplicate originals, were duly posted on the claim,

and for the period of publication, and I therefore overrule the last named objection.

5. Finally, it is further objected that there is no allegation or proof that the original locators of the Kempton mine were citizens of the United States, or that they had declared their intention to become such at the time the location was made.

The application, after setting out the location and transfer of said claim, alleges "that all the above-named locators of said claim and their grantees *are* citizens of the United States."

This is the only allegation or proof on this point contained in the entire record.

The first section of the act of May 10, 1872, provides "that all mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, *by citizens of the United States and those who have declared their intention to become such*, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable, and not inconsistent with the laws of the United States."

The sixth section provides "that a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation *authorized to locate a claim under this act*, having claimed," etc. These provisions, and those of the Mining Act of July 26, 1866, and of the pre-emption and homestead acts, indicate clearly, to my mind, the intention of Congress that no one but a citizen, or a person who had declared his intention to become such, should have the privilege of locating a mine, or acquiring a patent therefor.

Locators should possess qualification of citizenship.

The language is too clear to admit of any other construction. I suppose the reason of the rule was to prevent foreigners who might be inimical to the well-being and prosperity of the government, from obtaining possession and control of the vast interests which grow out of the mineral lands of the United States.

I do not wish to be understood as deciding that a person

who is not a citizen, or has not declared his intention to become such, can not make a location of a mine or dispose of it, provided he afterward becomes a citizen before he disposes of the mine.

"Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture. Osterman v. Baldwin, 6 Wall. 122.

Naturalization after sale.

An assignor can transfer no greater interest to his assignee than he himself possesses. While he is unnaturalized, he has no right to locate a mine. If he does so, and disposes of it before naturalization, a subsequent naturalization would not, in my opinion, save his location. If, therefore, it appeared in this case that the original locators were not citizens, or had not declared their intention to become such at the time their location was made, and that they had not become citizens when they transferred the mine, I should have no hesitation in holding that the transfer was invalid and the claim of the applicants was not good.

Presumption in favor of locator's qualification.

But there is no such allegation or proof in this case, and I should not be justified in presuming a state of fact which would work a forfeiture of the claim. The allegations or pleadings (if I may be allowed the expression) in proceedings of this kind, should be construed liberally, as I have heretofore held, and not, as at common law, most strongly against the pleader. Under this rule of construction, I find myself obliged to overrule the objection as to citizenship, which is accordingly done.*

I affirm your decision, and return herewith the papers transmitted with your letter of the twelfth day of November last.

Very respectfully,

C. DELANO, *Secretary.*

Commissioner General Land Office.

* In the case of Golden Fleece Co. v. Cable Con. Co., 12 Nev. 313, it was held, there being no evidence to show that the alleged alien colocators were aware of his disability, or were colluding with him, that the law would be sufficiently vindicated by holding the alien's claim void.

CHAPTER IV.

SURVEY OF MINING CLAIMS.

No. 1. A survey made prior to location can not be used as a survey for patent.

No. 2. Orders for survey and approvals of surveys should be done in regular order. First in time, first in right.

No. 3. Union Tunnel, Commissioner's decision.

a. When a claim has been surveyed for patent, and another person applies for survey of same claim, he must furnish a certificate of the register of the local office that application for patent, based on prior survey, is not pending.

b. When subsequent survey represents mere surface conflict, no obstacle.

No. 4. Union Tunnel, Secretary's decision.

a. Claimant entitled to have his location surveyed under the direction of the Surveyor-general.

b. Until introduced as evidence, such survey not subject to objection by any other person.

c. Circular of November 20, 1873, approved.

No. 5. Adjoining claimants have no right to protest, object, file evidence, or appeal on a question of survey until same is filed as evidence.

No. 6. *a.* Applicant entitled to survey.

b. Survey should show conflict with prior survey.

c. Certified copy of location notice to accompany field-notes.

d. Surveyor-general to be satisfied that five hundred dollars' worth of improvements have been made.

No. 7. Effect of survey.

a. Application therefor a withdrawal of claim from market.

b. Approval by Surveyor-general an indorsement that same is correct.

No. 8. Instructions in regard to establishment of mineral monuments.

No. 9. *a.* Discovery shaft center of lode.

b. Lateral measurement can not extend on either side of lode beyond limit allowed by local law.

No. 10. Discovery shaft middle of vein.

No. 11. Surveys which show triangle.

No. 12. Field-notes of survey filed without deposit for office work.

No. 13. Deputy surveyors not authorized to make survey out of district for which appointed.

No. 14. Courses and distances yield to fixed objects.

No. 15. The land department can not disregard the decisions of the courts in case of conflicting claims.

No. 16. Act of 1866.

a. Surveyor-general not to approve surveys until Register certifies that there is no adverse claim.

b. Register to pass upon question of regularity of application.

No. 17. Instructions to Deputy Surveyors in States where the Commissioner of the General Land Office is *ex officio* Surveyor-general.

No. 18. Survey to show conflict with prior survey, town lots, streets, etc., but where conflict is only with town lots, etc., all of surface to be included in entry. For surveys on adverse claims, see Nos. 30, 31, 32, 34, and 38 of that chapter.

No. 1. Survey prior to location not survey for patent.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, September 6, 1878.

SIR: I am in receipt of your letter of April 10, last, transmitting the papers in the case of the applications for patents for the X Sulphur mine and the Sulphur King mine, Gordon mining district, Utah.

Strictly speaking there is no question connected with the case before me for decision. No appeal has been taken from your decision rejecting the application of Edward Reilly for a patent for the X Sulphur mine, or from your decision approving the application for a patent for the Sulphur King mine. There are questions raised in your decision, however, which, though not material so far as the present case is involved, are of importance in the administration of the mining law, and should be considered.

It is asserted by Mr. Ferdinand Dickert that the survey of certain mines, including the X Sulphur mine, was made before they were on record or had any recognized existence.

The facts in relation to the survey of this mine are stated by you to be as follows: "The records of this office show that on the twenty-first of February, 1876, a survey was made of the X placer claim by M. T. Burgess, deputy mineral surveyor; that the same day the claim was located by Reilly, the location notice containing the same description as that given in the field-notes; that the location notice was recorded February 22, 1876; that application for the official order for the survey of said claim was made February 28, 1876; that the survey made February 21 was submitted to the Surveyor-general as the official survey of said claim, and by him approved on the third of March, 1876."

You further stated that "from the foregoing it will be seen that but one survey was made of said claim, and this prior to and for the evident purpose of securing description of the location. There certainly can be no legal objection

to a locator taking this precaution to secure an accurate description of the premises he desires to appropriate by location, and where such survey is made by a deputy mineral surveyor, and is found to have been correctly executed, there is no reason why such survey may not receive the approval of the Surveyor-general."

The statute on this does not appear to be definite and specific. Section two thousand three hundred and twenty-four of the revised statutes provides that the miners of each mining district may make regulations not in conflict with the laws of the United States, or the State or Territory in which the district is situated, governing the location, etc., of a mining claim. It would seem, from the wording of the act, that the law contemplated the location of a mine as the first step towards obtaining title to the same. It is further provided that the location must be distinctly marked on the ground, so that its boundaries can be readily traced.

Section two thousand three hundred and twenty-five of the revised statutes provides that "a patent for any land claimed and *located* for valuable deposits may be obtained in the manner following: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and *located* a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land-office an application for a patent under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common," etc.

The survey and plat, in support of application for patent, must be made subsequent to location.

The statute requires that the survey and plat above specified shall be made subsequent to the location. This is manifest, I think, from the further provision of the section, that the claimant shall, within the sixty days of publication, file the certificate of the Surveyor-general that five hundred dollars worth of labor has been expended or improvements made upon the claim by himself or grantors. The Surveyor-general should derive the information upon which to base his certificate from the deputy, who makes the actual survey and examination upon the premises.

This view, I think, is in accordance with the instructions

Geo. A. Crouse

issued to the Surveyor-general by your office, November 20, 1873, in relation to surveying mining claims.

I am of the opinion that your decision to the effect that a survey made prior to date of location might receive the approval of the Surveyor-general, and thus become the official survey contemplated in section two thousand three hundred and twenty-five, upon which a patent might issue, is contrary to the intent of the law, and is erroneous.

While the application for a patent for a claim thus surveyed should be rejected solely on account of said irregular proceeding, I am of the opinion that, before a patent issues, an actual survey of the claim on the ground should be made subsequent to the recording of the notice of location, as provided by law.

You are therefore directed to issue specific instructions to the Surveyors-general on this point, in order that their deputies may in the future proceed in accordance with the views above expressed.

The papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

Commissioner of the General Land Office.

No. 2. In case of conflict of claim, each claimant has the right to ask and receive his own survey, in the regular order and dispatch of business, without reference to other surveys awaiting approval or in process of execution, in every stage of the proceeding. The first in time is the first in right.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, August 18, 1880.

SIR: I have considered the appeal from your instructions of April 12, 1880, to the Surveyor-general of California, in the matter of the delivery to John Mains et al. (styling themselves the Mountaineer Mining Company), the Big Flat Gold Mining Company, and the Big Flat Gravel Mining Company, respectively, of certain mining surveys made by him under partially conflicting locations of placer claims in Del Norte county. November 4, 1867, John Mains et al. and the Big Flat Gold Mining Company filed applications for the survey of their respective claims, and L. B. Healey, deputy surveyor, was directed to execute the same.

November 6, 1879, the Big Flat Gravel Mining Company

applied for survey of its claims, and Charles F. Kaufman was employed as deputy to execute the work.

The grounds covered by these latter applications were a portion of those claimed in the former, although described by subsequent locations under different names, and the conflict does not appear to have been known to the Surveyor-general at the time of ordering the surveys.

* * * * * * * * * *

There was no proper appeal before you at the date of your instructions.

Those instructions were, however, issued and made to relate to these applications for surveys; and in view of the general practice to be affected by them, I deem it proper to give them such consideration as their importance demands, with a view of deducing a correct and uniform rule for the government of future cases of this nature.

In so far as you declined to take cognizance of any matters affecting the alleged ownership of the mining possessions, or to make any decision upon the same, you were undeniably correct. The reasons therefor are fully set out by you in this case, and also in the case of the protest of M. Shaughnessy against the approval of certain mineral surveys in Utah, submitted by your letter of the twenty-fourth of June last, and affirmed by me on the ninth instant.

In that case it was decided that no question relating to the merits of opposing claims could be considered by the Surveyor-general, that the law has provided for the presentation of such matters to the register and receiver by the filing of an adverse claim within sixty days after the application for patent; that the merits of the proceeding for patent were then immediately transferred to the courts, unless by failure to bring suit, the adverse claim was waived. In my decision it was also expressly held that the proceeding for the procuring of an official survey of a mining claim is, from its very nature, *ex parte;* that it prejudices the rights of no one, and settles or decides nothing as regards title; that no one has the right to be heard before the surveying department, by protest or otherwise, in opposition to the making or the approving of the survey, except the party applicant therefor.

Measured by these rules it would appear that the ques-

tion of priority of application, or execution, or approval, or delivery, is alike removed from contention by conflicting claimants; that each has the right to ask and receive his own survey in the regular order and dispatch of business, and without reference to other surveys awaiting approval or in process of execution.

Surveys should be assigned and approved in regular order.

The only rule of priority should relate to the order of receipt of the particular work requiring action. If application for survey be made, it should, of course, receive attention in advance of subsequent applications. When placed in the hands of the deputy, with the proper instructions, it should be executed by such deputy in the regular order of his allotted work, and when returned to the Surveyor-general for approval, the surveys should, in like manner, be examined and approved in the regular order of their receipt. If this rule should, in the discretion of the Surveyor-general, be departed from, it should only be upon good and clear reasons, and in cases where it would work no injury or prejudice to others.

In case of located mining claims, the survey as before intimated, is not the first proceeding. The location is the original step. The survey is but an official marking of what has already been marked and recorded under the laws respecting such locations.

The official survey must follow the record of the location. Whether it conflict or not with another recorded claim is not material. It is the private property of the claimant, and its value depends upon its accurate conformity to the record. Having a right to its procurement, no other party should be allow to intervene to delay its execution or withhold its delivery when prepared. But, in its execution, the deputy is usually designated, and employed by the applicant, and if another deputy, employed in the survey of a different location, under a subsequent application, succeeds, by greater diligence, in first returning his field work to the Surveyor-general, the first applicant can not demand that such work shall be set aside, or held to await the return of the deputy employed by him. The order of proceeding is preserved by action upon the work next imme-

diately in hand, not by any awaiting the return of work not yet executed, although previously ordered. This is the only reward of diligence; that in all stages of the proceeding, the first in time is the first in right, and, if the execution of the work by the agent selected by the applicant is not completed as early as the work of another by whom he fears he may be anticipated, he must nevertheless accept the situation, and pursue his right accordingly in the subsequent proceedings, whether he shall succeed in securing the advantage of an applicant for patent, or be relegated to the position of adverse claimant. Any other rule would work injustice to the party thus compelled to await action upon the other surveys, and subject him to the delays incident to laches, caprice, favoritism, and the like, or, where these do not intervene, to the possibilities of holding a small amount of work for the completion of a much larger contract, with which, except in a small part, his claim is not in conflict.

In so far, therefore, as the action of the Surveyor-general or your instruction went beyond these well-defined limits of proper executive action, and made the rights of the parties dependent upon each other, without regard to the condition of the work when it was reached in its proper order, I think there was error. Having no right to question the regularity or sufficiency of the mere application for a survey by other parties until confronted with such survey as matter of evidence in a proper proceeding upon the merits, after issue joined in a competent tribunal, there could arise no question of priority, unless raised by the surveyor-general himself in holding the one survey to be dependent upon the other, and attempting to control the priority of application for patent before the register by his own will and discretion in the approval and delivery of the plats. This he could not lawfully do; and if he should attempt to so discriminate, his action would be just subject of complaint and protest, and liable to be overruled by you. Prior to delivery of the plats, it might, possibly, upon proper foundation laid, be subject to appeal; but after such delivery there would, as a matter of fact, be no power to afford a remedy; as the *res* of the action would have passed beyond jurisdiction. Consequently, in such a case, recourse to appeal would be futile.

In the present instance, such appears to be the condition of the matter. There being nothing to adjudge upon the appeal, it must be dismissed. The practice to be affected will, however, be governed by the foregoing suggestions, and whenever occasion may require, may be enforced by your office by proper instructions.

The papers submitted by your letter of June 1, 1880, are returned. Very respectfully,

A. BELL, *Acting Secretary.*

The Commissioner of the General Land Office.

No. 3. UNION TUNNEL—COMMISSIONER'S DECISION.

1. When a certain claim has been surveyed as the basis for patent, and a party applies for the survey of the *same claim*, he must furnish a certificate of the register of the local office, that application for patent, based on the *prior survey*, is not pending.

2. When the subsequent survey applied for represents mere conflict with prior survey, and not conflict in claim, there is no obstacle to the approval thereof, and the claimant under the prior survey must protect himself by filing an adverse claim.

3. Questions of possession must be settled in the courts, and not by the surveyor-general.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 11, 1880.

FREDERICK SALOMAN, *U. S. Surveyor-general, Salt Lake City, Utah.*

SIR: Your letter of the twenty-fifth of March, transmitting to this office the notices of location, field-notes, and plats of the surveys of the Orient, Occident, Union Tunnel No. 1, and Union Tunnel No. 2 Lodes, and the accompanying papers of the protest of M. Shaughnessy against the approval of said surveys, is at hand, and has been considered. The facts in the case are briefly as follows: In running a tunnel four lodes have been discovered, these have been located, recorded, and surveyed according to the laws and regulations governing such cases. But it appears that all of the surface-ground claimed under said locations, is held under prior locations, made previous to the commencement of the tunnel, except a portion of the surface belonging to the Orient Lode.

An examination of each of the cases referred to, shows that the notices of location have been properly made and recorded.

The surveys have each been made in accordance with the law, and the rules and regulations of this office, and over the identical ground called for in the notices of location. The question thus presented is one which relates solely to the duty of the Surveyor-general in cases of conflicting surveys.

This question is not a new one, but has been repeatedly presented, and the instructions of this office of date November 5, 1874 (Land Owner, vol. 1, p. 133); April 20, 1877 (Land Owner, vol. 4, p. 35), have become the established rule, and govern in all such cases.

The instructions of April 20, 1877, apply to cases where application is made for the survey of a mine of which a survey has already been made. The above instructions to the Surveyor-general are as follows:

"An application for patent withdraws the lands therein described from subsequent application, until the first application is withdrawn or rejected. But a survey, unless followed by an application, does not withdraw the premises therein described, from survey or entry by any qualified party who shows compliance with the terms of the act. To hold that a survey under the mining act withdraws the land embraced thereby from sale or subsequent survey, would be to place it within the power of any party who might secure a survey to a given claim, to prevent the government from disposing of its title to that portion of the public domain. Where a party desires a survey of a tract already surveyed, you will require him to file with you a certificate from the register of the local land office, that there is no application for patent pending under such prior survey."

"The field-notes of the subsequent survey should show that they embrace the same premises as those described by such prior survey, giving the number and name of the claimants under such prior survey."

"If conflicts exist they should be shown in accordance with instructions in my letter of November 5, 1874."

In said letter of November 5, 1874, the Surveyor-general was instructed that a survey may receive the approval of the Surveyor-general at any time, when no application for patent is pending, *for the same mine*, if it is found, upon examination, to be correct, and made in accordance with law. * * *

"The approving of a survey of a mining claim, by the Surveyor-general, is merely an indorsement thereon over his own signature, that the survey is correct, and that it has been made in accordance with law and instructions." * * * "The Surveyor-general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims; each applicant for a survey, under the mining act, *is entitled to a survey of the entire mining claim as located*, if held by him in accordance with the local laws and Congressional enactments."

"If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plats and field-notes should show the extent of the conflict, giving the area embraced in both surveys, and also the distances from the established corners, at which the exterior boundaries of the respective surveys intersect each other."

In your letter you refer to the above quoted instructions, and ask for further directions, and say: "If under these instructions an application for patent withdraws *that mining claim* from market, pending the final disposition of the case, it certainly withdraws *every part of that claim* from market, and consequently no conflicting subsequent survey should receive the approval of the Surveyor-general under the same instructions. This is a logical conclusion."

You have evidently misapprehended the meaning of my instructions, and your mistake lies in the fact that you seek to apply that portion of the instructions relating to a second survey of the same mine to cases of conflicting surveys of different mines.

You say that the closing sentences of said instructions seem to have a different meaning. This is a fact, for the sentences referred to belong to a decision concerning conflicting surveys of different claims, and not to separate surveys of the same claim.

The instructions above quoted therefore contemplate that when a certain claim has been surveyed as a basis for patent, and a party applies for a survey of the *same claim*, he shall be required to file with you a certificate from the register of the local land office, that application for patent, based upon such prior survey, *is not pending*. This is to prevent error and confusion.

But where the subsequent surveys applied for represent mere conflicts with prior surveys, there is no identity of claim, and no confusion in your office or elsewhere.

If application for patent upon the prior survey has not been made to the register and receiver, there is no obstacle to the application for patent by the owner of the subsequent survey, and in that event the party who represents the first survey must protect himself by filing an adverse claim and suit in court. He loses his affirmative position as applicant by his own neglect. In any event, questions of possessory right must be settled in court, and not by the Surveyor-general.

If no adverse claim is filed and no suit commenced, then this office will pass upon the validity of the case.

The mines in question are not the same locations as the protestant's, but are separate and distinct locations of certain mines discovered and located in conformity with the law (see section 2323 U. S. Revised Statutes).

The surveys of said mines submitted by you have been correctly made, the boundaries carefully defined, the conflicts with prior surveys shown in accordance with instructions, and every requirement seems to have been complied with; to this there has been no denial.

The law which governs in cases of conflicting claims where only a portion of the surface ground is in conflict, must necessarily apply in cases of this kind, where the entire surface claimed is in conflict.

You are therefore instructed to approve said surveys, and interested parties must protect their rights by filing adverse claims. Very respectfully,

C. W. HOLCOMB, *Acting Commissioner.*

No. 4. Union Tunnel—Secretary's decision.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., August 9, 1880.

SIR: I am in receipt of your letter of the twenty-fourth of June, accompanied with the papers in the matter of the protest of M. Shaughnessy against approval by the Surveyor-general of Utah Territory, of the surveys of the following mining claims, to wit: The Orient, the Occident, Union Tunnel No. 1, and Union Tunnel No. 2, situate in Uintah

Mining District, in said territory. The claims purport to have been located in pursuance of section 2323 of the Revised Statutes, notices of the location of which were regularly recorded. The surveys above mentioned are of those locations. There is no charge of misconduct against the deputy who executed the surveys, nor is the correctness of his work in any way questioned. The protest is based upon the alleged fact that the surveys embrace the surface ground of other claims of prior location, founded upon discoveries made from the surface, which claims have already been surveyed, and for which, it is alleged, applications for patents are pending.

Upon the filing of the protest in his office, the Surveyor-general forwarded the same to your office, together with the field notes and plats of the surveys, and copies of the said notices of location, and asked to be instructed in the premises. Finding the facts to be as above stated, and that the locations were correctly surveyed, your office, under date of June 11, 1880, instructed the surveyor-general to approve the said surveys; whereupon the protestant, under date of the twenty-first of June, applied by telegram to have the Surveyor-general instructed to withhold his approval, and to be allowed thirty days within which to appeal from your instructions. You report the whole matter to this Department, and recommend, in effect, that the application be denied. I fully agree with your recommendation.

Claimant entitled to have his location surveyed and plotted under the direction of the Surveyor-general.

In the first place, a claimant having a mining claim which has been located and recorded according to law, has the right to have it accurately surveyed and plotted, in accordance with the location, by or under the direction of the Surveyor-general; and, in order that he may use such survey and plat in the proper prosecution of any right which he may have or allege to patent for such claim from the United States, he is entitled to the Surveyor-general's approval of the survey, and his usual certificate showing that the same was made in accordance with the law and instructions, and that the plat is correct; provided always, that the claimant pays the expenses of the survey (Revised Statutes, secs.

2325, 2326, and 2334); and no one, in my opinion, has the right to be heard before the Surveyor-general, your office, or this Department, by protest or otherwise, in opposition to the making or the approving of such survey, or the granting of such certificate, except the party entitled to the survey. The procuring of an official survey of a mining claim is, from its very nature, an *ex parte* proceeding, in which the claimant alone is interested. It prejudices the rights of no one, and settles or decides nothing as regards the title of the claim. When such a survey is procured, it may be used as evidence by the claimant in proceedings for patent. If there be a previous application for a patent of the same lands, such survey can not be of any value until such prior application be rejected, because such application would withdraw the lands described from subsequent application. If such prior application be rejected, it would, however, be of value to the party making the claim. It is the kind of evidence expressly provided by law for the purpose of identifying a claim, and showing its exact location and boundaries; and it is a fundamental legal principle that a party may produce competent evidence in support of an asserted right. But such a survey is not conclusive evidence, and may be objected to by an adverse claimant, and overthrown by competent testimony. By this right of objection all adverse parties in interest are fully protected, and may be heard at the proper time before tribunals having jurisdiction and ample authority in the premises.

Until introduced as evidence, survey of mining claim not subject to objection by any person other than the applicant therefor.

Until introduced in evidence for the purposes contemplated by the mining statutes, a survey of a mining claim is not subject to objection by any one but the applicant therefor, nor until then is there any occasion for objection or protest, save by the party for whom the survey is being made. A mining location, or record of location, might with equal propriety be objected to or protested against by parties not claiming under it. In every proceeding for patent under the mining statutes, not only does the tribunal before which the matter is pending examine into and pass

upon the correctness and legality of the survey, but it considers and decides the question of the legality of the location itself. Your office and this department have undoubted authority to make and enforce all proper and needful regulations concerning the manner of making surveys of mining claims, and exercise general supervisory powers in the premises, and may investigate cases of misconduct or insubordination on the part of deputy surveyors and surveyors-general, and enforce the production of honest and accurate surveys.

Circular of November 20, 1873, *approved.*

And I think the enforcement of the circular instructions of your office of November 20, 1873, which I fully approve, will secure proper surveys of mines, and leave no cause for complaint by any one.

From what has been said, it necessarily follows that no one except a claimant requesting a survey of a mining claim, has the right of appeal from a proposed or an actual approval or disapproval of a survey of such claim, or to appeal from any instructions of your office to the Surveyor-general regarding such a survey.

The papers submitted by your letter are herewith returned. Very respectfully,

A. BELL, *Acting Secretary.*

The Commissioner of the General Land Office.

No. 5. Adjoining claimants have no right to protest, object, file evidence, or appeal on a question of survey, until the same is presented as evidence in an application for patent.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, October 26, 1880.

SIR: I am in receipt of your letter of the twenty-fifth instant, accompanying the papers in the matter of the surveys of the Beatrice and Monitor mines, claimed by the Ivanpah Consolidated Mill and Mining Company, together with the appeal of Julius A. Bidwell from your instructions therein of August 16, 1880, to the Surveyor-general of California, and a letter lately prepared by you, addressed to the Surveyor-general, directing him to approve and deliver plats of said surveys to the proper parties without further delay.

You request me to dismiss said appeal, to approve your letter to the Surveyor-general, to give you explicit authority to dismiss all other like appeals, and to direct the Surveyor-general to refuse to receive any protest or appeal relative to the survey of a mining claim, except from the party entitled to such survey.

The appeal in this case was filed with the Surveyor-general September 3, and by him forwarded to your office September 6, 1880, nearly a month after my decision in the matter of the surveys of the Occident, Orient, and other mines, under which decision it should not have been accepted and forwarded by the Surveyor-general, provided that officer had received instructions in accordance therewith; but having been received and forwarded, it should have been promptly dismissed by your office.

No right to protest against proposed survey by adjoining claimants.

The practice of permitting adjoining claimants, or persons not applicants for the survey, in a case like this, to protest, object, file evidence, and appeal, where no case to which they are parties, or in which any question of their right of possession or to a patent is involved, is before this department for decision or final action, is, in my opinion, altogether wrong, and the sooner it is entirely discontinued, the better it will be for all parties concerned. Every proper objection can be made to the survey whenever it is put or offered to be put in evidence in support of an opposing or conflicting right or claim. The anticipation of such objection before the plat is offered in proof in support of a claim seems to me a little worse than useless.

I do not think it necessary for me to approve your letter to the Surveyor-general, for it is not at all likely that he will refuse to obey your instructions. I will say, with reference to letters of that character, directing the approval of such surveys, that they are not to be considered in any way as decisions affecting the merits of cases. They will not preclude objections to surveys presented in support of applications for patent, or adverse claims, and the approvals of surveys by direction from your office are not to be considered as having any more or greater force or weight than

ordinary approvals of surveys of mining claims by the Surveyor-general without reference to your office or direction therefrom.

I think my decision of August 9, 1880, in the case above mentioned, gives you full authority to do what you request me specially to direct in this matter. If special instructions to Surveyors-general thereunder are deemed necessary, that decision is ample warrant for your issuing them.

I will say here that the approval, by letter of August 9, 1880, of instructions heretofore issued by your office to Surveyors-general, regarding the manner of making surveys of mining claims, is not to be understood as extending to any instructions in conflict with the principles of the decision.

The papers submitted with your letter are herewith returned. Very respectfully,

A. BELL, *Acting Secretary.*

The Commissioner of the General Land Office.

No. 6. 1. Each applicant is entitled to a survey of his claim as located.

2. Where in running the exterior boundaries of a claim it is found that two surveys conflict, the plat and field-notes should show the extent of the conflict, etc.

3. A certified copy of the location notice should accompany the field-notes of the deputy surveyor in every instance.

4. The Surveyor-general should be satisfied that five hundred dollars worth of improvements have been made.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 30, 1877.

R. H. MASON, Esq., *U. S. Surveyor-general, Montana.*

SIR: With your letter of the fifth inst., you transmitted the plat and field-notes of survey of the J. H. Russell lode, designated as Lot No. 77, township 8 north, range 5 west, Montana, together with protest against your approval of such survey.

It appears from the papers submitted that on the twenty-first of September, 1877, J. H. Russell made application for an order for survey of said J. H. Russell lode, and that on the twenty-sixth of the same month B. F. Marsh, deputy mineral surveyor, executed a survey of said mining claim.

John W. Gonu filed a protest against your approval of this survey, alleging:

1. That the said J. H. Russell lode has been abandoned and relocated as the Empire lode, and that an action is now pending in the local courts in regard to the title to said lode.

2. That said J. H. Russell lode has not been surveyed in accordance with its general course or its original location.

3. That the survey of the said J. H. Russell lode conflicts with the survey made for the claim of Mary A. Hoyt on the Mammoth lode.

4. That the labor and improvements upon the said J. H. Russell lode do not exceed five hundred dollars.

5. That the discovery shaft was sunk upon this lode by the claimants of the west half of the lode and J. H. Russell jointly, and not by Russell alone; and,

6. That the application for survey was not accompanied by certified copy of location notice.

Accompanying this protest is found a certified copy of the location notice of the Empire lode, which was discovered July 3, 1877, and a copy of a certificate of the clerk of the third judicial district court, Montana, to the effect that on the eighteenth of September, 1877, John W. Gonu commenced an action in said court for the recovery of the possession of the Empire lode.

As the first objection has reference to the title to said claim, it is a question over which the Surveyor-general has no jurisdiction, and in regard to which he has no duties to perform.

Applicant entitled to a survey of claim as located.

Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim *as located*, if held by him in accordance with the local laws and congressional enactments.

In the case under consideration the applicant alleges under oath that said J. H. Russell lode was located and recorded prior to May 10, 1872, in conformity with local laws and congressional enactments, and that it has never been abandoned since its original location.

Whether said claim was legally located and has been held in conformity with the law, since the day of location, are questions which would properly come before the courts

for determination, should an adverse claimant appear in the manner prescribed by the statute against the issuance of a patent for said mine.

In regard to the objection, that the survey does not conform to the general course of the lode or its original location, it is only necessary to state that no evidence has been filed to contradict the correctness of such survey in this respect, but on the contrary the deputy-surveyor, who made said survey, reports that, "I began at discovery shaft and found by prospect holes in the line of the lode that the course of the vein or lode is N. 7, 9° E. * * * * I have run the side boundaries parallel to the direction of the vein, which was ascertained by the line of shafts on the lode to be N. 7, 9° E."

The location of this mine was made in 1867, and the notice of location, like many of the earlier notices, fails to give an accurate description of the premises located, but as the deputy reports that the survey embraces and covers the line of the lode, the survey, if correct in other respects, should receive your approval.

It is also objected that the survey so made conflicts with the survey of the Mammoth Lode.

The field notes and plat of the J. H. Russell Lode show the distances from the established corner of No. 1 of said survey, No. 77, to the intersection with the easterly boundary of survey No. 76, and from corner No. 3 of survey No. 77 to southerly boundary of survey No. 76. They should also show the distance from corner No. 3 of survey No. 77 to easterly boundary of survey No. 76, and from corner No. 4 of survey No. 77 to the southerly boundary of survey No. 76. The plat and field notes should also show the extent or area in conflict.

Conflict of surveys should appear on plat.

In all cases where in running the exterior boundaries of a claim it is found that two surveys conflict, the plat and field notes should show the extent of the conflict and the area embraced by both surveys, also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other.

When the survey in question has been corrected as above

indicated, it will in this respect conform to the instructions of this office in like cases.

It is urged that a copy of the notice of location did not accompany the application for survey.

A certified copy of the location notice is shown to be on file in your office, but the date of the filing of the same in your office is not shown.

Copy of location notice should accompany field notes.

In all cases a certified copy of the location notice from the office of the proper recorder should accompany the field notes made by the deputy.

There *may* have been an irregularity *in regard to the time* of filing the copy of the notice of location in your office, but, as it is on file in your office, the Surveyor-general would not be authorized to withhold his approval of said survey on this account.

It is also urged that the labor and improvements upon said claim do not exceed the sum of five hundred dollars.

Section 2325 of the Revised Statutes of the United States requires the claimant at the time of filing his application for patent, or at any time thereafter within the sixty days of publication, to "file with the register a certificate of the United States Surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors."

In the case under consideration, if you are not satisfied from the evidence on file that the required amount has been expended upon the said J. H. Russell Lode by said applicant or his grantors, you will require further evidence upon this point before furnishing your certificate.

This survey should receive your approval when the corrections indicated above have been made, and your certificate should be furnished when satisfied that the required amount has been expended upon the claim by applicant for patent and his grantors.

You will acknowledge the receipt hereof, and inform all parties in interest of the import of these instructions.

I return said plat and field notes.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 7. Effect of survey.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 5, 1874.

T. B. SEARIGHT, Esq., *Surveyor-general, Col.*

SIR: With your letter of the thirteenth instant you transmitted copies of certain letters received by you, and of your replies thereto, in the matter of the survey of the Crown Point lode, Colorado. * * *

The questions submitted are these:

1. Was the resurvey of the Crown Point lode made after the filing of said adverse claim, and prior to the final disposition of the said application by this office, legal?

2. Does an appeal lie from the decision of the Surveyor-general to approve a survey of a mining claim?

Application for survey virtually withdraws the claim from market.

In reference to the first question I would state that, after an application has been made for patent for a given mining claim, such claim is virtually withdrawn from market, pending the final disposition of the case, and no survey, as the basis of a patent, should receive the approval of the Surveyor-general for the same tract until the first application has been disposed of.

Modification.

Parties may, however, have the *field work* of a survey of their claim made at any time, and if executed by a duly appointed deputy mineral surveyor, such survey may receive the approval of the Surveyor-general, at any time when no application for patent is pending for the same mine, if it is found upon examination that the survey is correct and made in accordance with law.

In the case under consideration the *field work* was executed while the said application was pending. The survey was not approved until the eighth of October, 1874, after said application for patent had been rejected.

Approval of survey by Surveyor-general on indorsement that same is correct.

In reference to the second question I would state that the

approving of a survey of a mining claim by the Surveyor-general is merely an indorsement thereon, over his own signature, that the survey is correct, and that it has been made in accordance with law and instructions, and until he has actually affixed his signature approving such survey no appeal lies to this office, as an appeal can not lie from a *proposed action or decision.*

If, however, a protest is filed against a given survey, you should in all cases transmit the plat and field notes of survey, together with all papers which may have been filed with you in the case, to this office, that such action may be taken as the law and the facts may warrant.

In this connection I would state that the Surveyor-general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

Each applicant for a survey under the mining act is entitled to a survey of the entire mining claim, *as located,* if held by him in accordance with the local laws and congressional enactments.

Conflict of surveys to be shown.

If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plats and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other.

If parties desire to protect their interests which would be adversely affected by the issuance of a patent for the claim as surveyed, they must file an adverse claim against such application in the manner and form prescribed by the statute, for in no other way can their alleged adverse rights be adjusted.

In the case under consideration, both surveys having been approved, the respective parties may, upon full compliance with the law and instructions, make application for patents for their claims to the local land officers, in which event it will be necessary for them to proceed in the manner indicated by the law and circular instructions.

You will inform all parties in interest, and acknowledge the receipt hereof. Very respectfully,

S. S. BURDETT, *Commissioner.*

No. 8. Instructions in regard to the establishment of *mineral monuments.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 27, 1880.

WM. P. CHANDLER, *United States Surveyor-general, Boise City, Idaho.*

SIR: In answer to a letter received from Frank P. Cavanah, United States Deputy Mineral Surveyor, dated February 3, 1880 (copy herewith), asking for instructions with regard to establishing mineral monuments, you will instruct him and other deputies under your control that too much care can not be exercised in making mineral monuments or other reference marks used to fix the *locus* of mineral claims permanent.

Carelessness in this respect has already caused this office great inconvenience, and claimants even more.

In all cases when it is found necessary to establish a mineral monument, or initial point, no reasonable or practicable precaution should be neglected to render it permanent.

Tree not a permanent natural object.

A tree should not be considered a permanent natural object, and it would not satisfy the requirements of this office as an initial point of a mining claim, even when witnessed by two or more neighboring trees.

A reference of this kind would answer well enough to mark some point upon the lines of the public survey, for in this case, the accuracy of the entire survey does not depend upon the reference, and the lines could at any time be rerun and the point fixed, even though the references had been obliterated.

When an initial point is taken at the confluence of two streams, the instructions should not be undertstood to mean the actual point of intersection of the two currents.

Water's edge.

Neither should the water's edge, at the apex of the angle formed by the intersection of two streams, be taken as a starting point, for it is well known that such a point could not, from the nature of things, be permanent, but would be continually, owing to natural causes, changing its position

by the wearing away of the banks, or a change in the position of the beds of one or both of the intersecting streams.

Confluence of two streams.

The term, *confluence of two streams*, should only be used to define particularly the spot or locality upon which a mineral monument is erected. Such a monument should be placed sufficiently far away from the banks of the streams to protect it from any changes which might take place; and its position should be rendered additionally secure by reference, where such are available, to some natural and permanent objects in the vicinity.

Mineral monuments connected with each other.

Where two or more mineral monuments are established in the same district, they should be accurately connected with each other, either by surface measurement or by triangulation, and where practicable the initial points of adjacent mining districts should be similarly connected.

From time to time, as occasion may require, you should furnish this office with connected diagrams of the mineral claims in all the mining districts under your control, constructed on a scale of not less than one inch to forty chains.

When extended, the lines of the public surveys should be shown upon said diagrams.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 9. 1. When not shown to be otherwise, the discovery shaft is assumed, for executive purposes, to be the center of the lode.

2. Lateral measurements can not extend on either side of the lode beyond the limit allowed by the local law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 23, 1880.

ALBERT JOHNSON, *U. S. Surveyor-general, Denver, Colorado.*

SIR: The plat and field notes of the survey of the claim of George B. Robinson upon the G. B. R. Lode, Lot No. 409, Consolidated Ten Mile Mining District, Summit county, Colorado, are returned herewith for amendment.

In Summit county the laws of Colorado limit a locator to seventy-five feet of surface ground on each side of the center of the vein or lode.

Discovery shaft center of lode.

When not shown to be otherwise, the discovery shaft is assumed for executive purposes to be the center of the vein or lode.*

In this case the full width allowed by the law being claimed, the lode must be assumed to lie in the center of the claim midway between the side lines; but the lateral measurements must be made each way from the discovery shaft and in the general direction indicated by the side lines; a line drawn from the discovery point south-easterly, parallel to the side lines, to indicate the center of the lode, shows that the width of surface ground on the south, beginning at corner No. 8, is thirty-five and forty-two hundredths feet in excess of the prescribed limit.

Lateral measurement.

The claimant was not justified, in order to compensate himself for the surface abandoned on account of the conflict with survey No. 369, in adding a similar amount to the opposite side of his location. Lateral measurements can not extend on *either* side of the vein or lode beyond the limit allowed by the local laws.

You will require an amendment of the survey as indicated, abandoning the surface in excess of seventy-five feet, lying south of a line beginning at corner No. 8, and extending south forty-eight degrees twenty-three minutes east until it intersects the eastern end line of the claim.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 10. The point of the vein developed by the discovery shaft, when further prospecting does not show that the nearest actual surface point is elsewhere, must be assumed to be the middle of the vein.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 28, 1878.

Register and Receiver, Helena, Montana.

GENTLEMEN: I am in receipt of receiver's letter of first ultimo, transmitting mineral application No. 613, made in

* A location of a lode mining claim will be presumed to include the vein upon which the discovery was made, until the contrary appears. Patterson v. Hitchcock, 3 Col.

your office May 21, 1878, by the Hope Mining Company, for the "Potosi Lode," being lot 57, in township 7 north, 13 west, together with protest by James K. Pardee against entry, and asking that the application and survey be canceled.

Mr. Pardee claims and represents no adverse interest, but bases his protest on the following grounds, to wit:

1. That he finds on examination of the certified copy of the location, and of the official plat and field notes of survey, that said claim was located with surface ground largely in excess of the amount allowed by law, and that the plat shows that the claim was surveyed with a width of surface on the north side of about thirty feet in excess of three hundred feet.

2. That from an examination of said notice of location it is evident that said Potosi lode has been floated a distance of about sixty-one feet eastwardly from the position in which it was staked at the time of its original location, no evidence appearing to have been taken that the stake found by the deputy surveyor at the south-east corner was the identical stake originally patented and given in said notice.

3. Affiant believes said notice of location is void for uncertainty, for the reason that no description of the kind or size of the stakes used or the marks placed thereon is given in said notice of location, "for which reason the said claimants, in the absence of proof to the contrary, could call anything that happened to be stuck in the ground their boundary stake."

On said first objection I find that the width on the northerly side of the discovery shaft is about three hundred and thirty feet, and the width on the southerly side about one hundred and twenty-five feet.

The Surveyor-general, under date of ninth ultimo, informed this office that said survey should not have been approved, for this reason, and that he did not discover the error until the twenty-ninth of July last.

The law (sec. 2320 U. S. Revised Statutes) provides that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface."

When the vein outcrops at the surface, there can be no

question as to the point from which this lateral measurement must begin.

Middle of vein.

When the discovery shaft develops the vein at some distance below the surface, and the locator does not determine by any further prospecting that the nearest actual surface point is elsewhere, and the fact does not otherwise appear, I am of the opinion that the point of the vein so discovered must be assumed to be the middle of the vein, and the lateral measurements be calculated therefrom.

The law is mandatory, and contemplates that but three hundred feet of surface ground shall be taken on either side of the vein; and a compliance with the law necessitates the fixing of the point from which these measurements shall begin. I think the rule above indicated is the only one practicable.

In this case the width of the claim on the northerly side is more than three hundred feet from the discovery opening; and the plat and field notes have this day been returned to the Surveyor-general for correction in said particular.

Referring to the second objection by protestant, I find that the location notice describes the claim as follows: "Beginning at M. C. stone No. 3 on the Hope Lode, and running north seventy-three degrees east along the north line of said Hope Lode, seven hundred and ninety-five feet to a stake; thence north sixty-eight degrees west nine hundred and fifty-three feet to a stake; thence south seventy-three degrees west eighty-nine and four tenths feet, to a stake; thence south sixty-six degrees thirty minutes west one thousand three hundred and forty-three feet to a stake; thence south sixty-eight degrees east eight hundred and forty-one feet to a stake; thence north sixty-six degrees twenty minutes east seven hundred and twenty feet to the point of beginning. Discovery stake is one hundred and forty feet north-east from corner-stone No. 3, of the Hope Lode, and one hundred and twenty-five feet north from north line of Hope Lode." This location was made February 12, 1876.

The field notes of the survey presented for patent show that the surveyor began at the same point as did the loca-

tion; that he ran south sixty-six degrees thirty minutes west (instead of east, as in the location), along the north boundary of the Hope Lode claim "to a post marked for south-west corner of Potosi Lode;" thence north sixty-eight degrees west (the same courses given for these two lines in the location), to a point from which north-west corner of this claim bears north sixty-eight degrees west two hundred and thirty-eight feet distant. Bearing in mind that the width of this claim as surveyed for patent, is much less than as located, and that the north-west corner here referred to is the north-west corner of the location; that the westerly line bears north sixty-eight degrees west in both location and survey for patent, and that said line continued, as above shown in said survey, *in the same direction* intersects at the north-west corner of the location, it is evident that the westerly line of location and the westerly line of survey for patent coincide, and are one and the same line, for, when extended two hundred and thirty-eight feet in the same direction beyond the north-west corner of said survey, they are both found at the same point. Hence I conclude that the stake found by the surveyor at the south-west corner, and described by him as "a post marked for south-west corner of Potosi Lode," was the location corner post. The measurement eastwardly does not give a greater linear distance than that given in the location, and I therefore conclude that the survey can not extend eastwardly beyond the location.

On the third point of objection, it is only necessary to say that it does not apply to this case. As shown above, the southerly and westerly boundary lines of survey are proven to have been the location boundary lines—the first being a line common to two surveys, and the second being proven, as aforesaid, to coincide with the westerly location line. The northerly boundary line is within the location, and the easterly boundary is by measurement less than that given in the location. There is no adverse interest involved, and no averment is made that the boundary stakes are not those marking the location. I therefore decide that the applicant can proceed for patent after the Surveyor-general shall have corrected the survey and plat, as aforesaid, to comply with the law in respect to the lateral measurement on the northerly side of the discovery opening.

You will be hereafter governed in your official action by the rule herein stated with regard to the width of lode claims. Give notice to all parties, and acknowledge receipt hereof. The papers are herewith returned.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 11. 1. A survey which shows a triangle which embraces the entire lode or vein claimed, can not be approved, unless the lode itself extends into and fills the point in the acute angle, and then only when adverse rights existing on the tenth day of May, 1872, render it necessary.

2. Where lode intersects another claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Jan. 29, 1879.

FRED C. MORSE, Esq., *Fairplay, Colorado.*

SIR: I am in receipt of your letters of November 28 and December 8, 1878, asking in substance whether it will be in accordance with the instructions of this office, requiring the end lines of lode claims to be in all cases parallel to each other, to make a survey whereof one of the ends overlaps a previously approved survey; and you send a diagram illustrating your question which shows the end of one survey overlapping the end of another patented survey. You state that the portion covered by both surveys was excluded by a clause in the field notes.

You are informed that the proceeding detailed as above was erroneous. The end lines of the second survey were not parallel when patented. The law gives the owner of a lode a right thereto for a certain length, and should his lode dip under the adjoining side lines of his claim, he may, without entering upon the surface, prosecute the dip under such adjoining land, but is restricted in so doing to the ore lying within the extension of the parallel end lines. Now, by an examination of the diagram made by you, it will be at once perceived that to keep within the extension of the end lines would, on entering adjoining lands, gradually shorten the length of his lode on one side, and lengthen his lode on the other, and, probably, at least possibly, conflict with rights of other parties assured to them by patent, or under the law.

Triangle.

You also submit a diagram in the form of a triangle, and ask whether such surveys will be approved by this office. On this point, I would say that in no case can a triangle, *which embraces the entire lode or vein claimed,* be approved, unless the lode itself extends into and fills the point in the acute angle, and then only when adverse rights, existing on the tenth day of May, 1872, render it necessary. See section 2320, U. S. Revised Statutes, which precludes a restriction of the width to less than twenty-five feet on each side of the middle of the vein at the surface.

Neither can the surface ground extend beyond the end of the lode in any instance.

When lode intersects another claim.

Where a lode intersects another claim, and extends within a prior survey or location, it may be patented to the length allowed by law, and if the end of the lode is found within such prior location, the surface ground may close upon the prior survey; *provided,* the extension of the end line within such prior survey, *parallel to the other end line,* would not exclude any portion of such surface ground.

Where a survey of the kind last above mentioned results in a triangle formed against the prior survey, the shape of the same, subject to the restrictions, as to the surface ground extending beyond the lode before named, will not be objectionable; but this will not apply where the lode embraced by the subsequent survey is merely the extension or continuation of the same lode on which prior location is made, for in such case the lode itself can not extend within the prior location. * * * *

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 12. Effect of filing field notes of survey unaccompanied with deposit for office work.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 10, 1877.

NATHAN KIMBALL, Esq., *U. S. Surveyor-general, Utah.*

SIR: I have carefully examined and considered the papers which have been filed in this office in regard to the surveys

of the Bright Point, Thor, and Venus mines, Big Cottonwood Mining District, Utah.

A large number of papers have been filed in regard to said surveys, and much bitter feeling seems to exist between the respective claimants, and toward your office, arising out of these surveys.

The facts appear from the papers submitted as follows, viz.: On the eighteenth of September, 1876, F. Dickert, Deputy Mineral Surveyor, obtained from your office a number by which to designate a survey which he expected to make of the Bright Point mine. The number given him was sixty-one.

On the twenty-second of September, said deputy filed in your office the field notes of survey of said claim, but made no deposit for office work.

As the deposit for office work was not made, and as no further attention was paid to said survey by said deputy or the claimants of said mine, you were wholly justified on the eighteenth of November, 1876, in directing that the number sixty-one should be used to designate a survey which on that day you gave the order to Deputy Surveyor, E. B. Wilder, to make of the Venus mine in the same district, and for which survey C. F. Winslow made required deposit.

Deputy Surveyor Wilder made a return of the field notes of surveys of the Thor and Venus mines, and the same, after the necessary corrections had been made, were approved by you on the twenty-second of December, 1876. In the mean time, however, L. P. Borg, one of the claimants of the Bright Point mine, made the required deposit; but as a survey had been made for the Venus mine, which embraced a large portion of the premises described in the Bright Point mine, you properly required that the survey of the Bright Point mine should show the conflict with the Venus survey.

Parties who desire to have official surveys made of their mining claims must make the required deposit for office work with the surveyor-general, and until such deposit is made the surveyor-general should not treat such surveys as official.

Subsequent survey entitled to precedence.

Your action in requiring the Venus and Thor claimants to

make references in their surveys to the Bright Point mine is approved, the same being in accordance with your previous instructions in such cases.

The bitter feeling which exists in regard to these surveys arises from the fact that said claimants appear to be of the impression that questions of title can be determined under the law by your office.

Your office has no duty to perform in regard to settling disputed titles to mining claims.

Seeing no error in your decision in regard to these surveys, the same is approved.

Be pleased to inform all parties in interest and acknowledge the receipt hereof.

Very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

No. 13. Deputy Mineral Surveyor not authorized to make survey out of State or district for which he is appointed.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Aug. 6, 1872.

W. M. SEAWELL, Esq., *Aurora, Nevada.*

SIR: Referring to your letter of twenty-fifth ultimo, I have to state that a deputy mineral surveyor is not authorized to make surveys of mineral claims outside of the State or district for which he is appointed.

* * * * * * *

Very respectfully, your obedient servant,

WILLIS DRUMMOND, *Commissioner.*

No. 14. Courses and distances give way when in conflict with fixed objects.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 15, 1873.

SIR: I inclose herewith a copy of the opinion of Hon. Walter H. Smith, Assistant Attorney-general, in the matter of the application of the Brown Silver Mining Company, for patent for the Mammoth Lode, Central City district, Colorado Territory.

I concur in the views set forth in the opinion, and reverse your decision adverse to the application.

This decision cancels and sets aside that of the twenty-fifth February last, in this case.

The papers transmitted with your letter of thirteenth January last are herewith returned.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND, *Commissioner General Land Office.*

[Inclosure.]

DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY-GENERAL,
WASHINGTON, D. C., July 15, 1873.

SIR: I have examined the application of the Brown Silver Mining Company, for a patent to certain premises in the Territory of Colorado, on appeal to your department from the adverse decision of the Commissioner of the General Land Office, of the fourth of September, 1872. He rejected the claim, for the reason that the premises were described differently in the application and the final survey.

The only point of difference consists in this—the application commences its description at the mouth of the Brown Silver Mining Company's tunnel, and runs thence north 7° 30′ west 100 feet, to the discovery of the Mammoth Lode. This course of north 7° 30′ west 100 feet will not reach the discovery, but it requires a new and additional course of north 16° east, and a distance of eighty-one feet, to reach the discovery. With the exception of the above, there is no discrepancy between the application and final survey. I think that, in law, there is no discrepancy. It is well settled that courses and distances must give way when in conflict with fixed objects. The application calls for two well-defined fixed points: the mouth of the tunnel, and the discovery. The course and distance given will not lead to the discovery. They must, therefore, be rejected, and the call requires a straight line from the mouth of the tunnel to the discovery.

I advise a reversal of the decision of the Commissioner.

Very respectfully,

W. H. SMITH, *Assistant Attorney-general.*

Hon. C. DELANO, *Secretary of the Interior.*

No. 15. The Land Department can not disregard the decisions of the courts.

DEPARTMENT OF THE INTERIOR,
GENENAL LAND OFFICE, January 26, 1869.

Hon. A. A. SARGENT, 307 *Delaware Av., Washington, D. C.*

SIR: * * * It may be true, for aught this office knows to the contrary, that the Inimitable Company lost its case in the California court, through its attorneys; but if so, the injury is one this office has no power to correct. It can neither supervise nor disregard the decisions rendered by such courts in cases of conflicting claims to the possession of mining property under the local customs, and until the Inimitable Company can procure a reversal of the judgment against it in the case above referred to, no patent can be issued to it for the premises in controversy in the suit between it and the Union Copper Company.

Very respectfully, your obedient servant,
JOS. S. WILSON, *Commissioner.*

No. 16. Approval of survey under the act of 1866.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., May 22, 1880.

SIR: I have received your letter of the twelfth ultimo, transmitting the applications of the claimants of the Empire, Crescent, Lady Alice, and Bunker Hill mines, located in the Bodie mining district, Mono county, California, to the Surveyor-general of said State, for an approval of the surveys of said mines, made by R. M. Wilson, Esq., U. S. Deputy Mineral Surveyor, in the year 1867.

An examination of the papers transmitted, shows that on the fifth and seventh days of February last, the Surveyor-general of said State addressed to you two letters in relation to the applications made to him by the Empire Gold and Silver Mining Company and the Crescent Mining Company, for an approval of the surveys made of those mines, as above mentioned, in both of which letters he stated, in substance, that he had examined the statements made by each of said companies, and "finding that the claims as to time, amount expended, publication of notice, etc., as required by the mining act of 1866, have been duly and properly complied with, I have only declined to

approve their survey because of the absence of any certificate from the register of the local land office, certifying that there is no adverse claim." For that reason, viz., because the certificate of the register was not presented showing no adverse claims to the tracts included within the surveys named, he requested instructions from your office, stating that he could find no precedents, nor any instructions or rulings of the department or your office governing the case.

These letters were received by you and duly registered on the sixteenth of February, 1878. On the same day you state "that a communication was received from Messrs. Britton & Gray, and N. L. Jeffries, Esq., objecting to the approval of the surveys of said claims, and alleging that certain papers in the case are forged." Between the sixteenth of February last and the twelfth ultimo, it appears that numerous other papers were received and filed in your office, in part from the Surveyor-general's office in California and the local land officers, but principally from the attorneys of the claimants and the contestants.

In view of the claims presented, and the allegations made by the contesting parties, on the twenty-seventh of March last, you instructed the Surveyor-general to decline "to order any survey of any mine conflicting with the surveys made for the said Empire, Lady Alice, Crescent, or Bunker Hill mines, or to deliver any plat or field notes which have already been approved, until instructed so to do by this office." On the same day you instructed the register and receiver at Independence, California, to decline to receive any application for patent for mining claims in conflict with said mines, until instructed so do. These instructions, I think, were very proper, pending the investigation of the questions presented. No final action has been taken, or instructions given to the Surveyor-general upon the question propounded, and it is now before me for that purpose, as submitted with your letter above mentioned.

Surveyor-general not to approve surveys until register certifies that there are no adverse claims.

After a careful examination and consideration of the instructions and practice of your office, pertaining to mining

claims located under the act of July 26, 1866, I am of the opinion that the Surveyor-general should be instructed not to approve such surveys in any case until he receives the proper certificate from the register of the local land office that there are no adverse claims to the tracts therein described. This seems to have been the practice heretofore adopted in the adjustment and settlement of claims under the provisions of the said act, made necessary by the peculiar provisions of the act itself, as well as the conflicting nature of the claims arising thereunder, and I can conceive of no good reason why that practice should now be changed. If the register, in any case arising under said act, improperly refuses to give the required certificate, the claimant may appeal to your office, and ultimately to this department, for such relief as he shall make it appear he is entitled to have in the premises.

Register to pass upon question of regularity of claimant's application.

It is the duty of the register, in the first instance, to pass upon the regularity of the claimant's application for a patent, as well as his right to make the same for the tract therein described, and from his decision, in all matters arising under a general law, like the one under consideration, an appeal lies to your office, and not to the surveyor-general of the particular State or Territory. This brings me to a consideration of the following question, viz.: Did the register improperly refuse the certificate in these cases? From an examination of the papers transmitted, I find that certain steps were taken by the applicants to obtain patents for each of the mines above mentioned during the years 1866–7–8, under the mining act of July 26, 1866. These proceedings, the applicants allege, were regular and complete, as far as they were carried, viz.: to the completion of the surveys of said mines by the United States Deputy Mineral Surveyor, as required by the third section of the act above cited. Said surveys were, however, not approved by the Surveyor-general, as required by the terms of said act; nor was an entry of the tracts claimed, made at that time. No further proceedings appear to have been taken in relation to said applications until the latter part of the year 1877,

and the early part of 1878. Upon a renewal of the applications at that time the register refused to give the certificate required, whereupon the claimants applied to the surveyor-general for an approval of the surveys without such certificate, and that officer requested instructions of you in the premises, as above stated.

An examination of the papers transmitted shows that a large portion of the tract, included in the survey of the Empire claim, was patended under the mining act of May 10, 1872, to the Osceola and Tioga Mining Companies, August 31, 1877; that the greater portion of the Bunker Hill claim, and some part of the Lady Alice claim, were patented to the Bullion Mining Company, under the same act, on January 8, 1877. No objections or protests appear to have been made to the applications for patents of the claims last above mentioned. It also appears that applications for patents under the act of 1872 have been made, and are now pending, for other portions of the tracts embraced within the claims first above named. The claimants of the tracts patented, as well as those who have made applications under the act of 1872, which are now pending, allege that the claims above mentioned, located under the act of 1866, had been abandoned prior to their relocations thereon. This is denied by the first claimants, and affidavits have been filed by both parties in support of their respective allegations. Counsel for claimants, under the act of 1872, allege that a part, at least, of the proceedings by the claimants, under the act of 1866, were irregular, and that some of the papers connected with their applications are forgeries.

Without passing upon this latter charge, I find that all proceedings initiated by the first claimants in the years 1866–7–8, for the purpose of obtaining patents, have been suspended for a period of ten years; that during that time the law under which they were initiated has been repealed, saving, however, the existing rights of all parties to locations made thereunder; that under a subsequent law of Congress, for the disposal of mineral lands, a large portion of the premises claimed have been patented by the United States, and that applications are now pending for portions of said claims still unpatented. While it is true that the rights of the parties who initiated claims under the act of

1866, which were not perfected until after the repeal of said act, are to be protected, it is also true that the question, as to whether such rights exist, is always one of fact, and must be affirmatively shown.

In view of the facts above stated, I think the register properly refused the certificate requested. Had such certificate been given, the approval of the surveys would have followed as a matter of course, an entry would have been made, and the parties who now allege an abandonment of all rights and claims to the tracts upon which their relocations have been made could have been considered as protestants only—not parties in interest. Whether such an abandonment had taken place before the relocations were made, I shall not now undertake to determine. On the one hand it is alleged, and on the other denied, and an issue of fact is thus presented which can only be determined upon testimony hereafter to be taken, relevant thereto.

In view of the fact that patents have issued for a large portion of the tracts claimed, no further action in relation to such patented premises should be taken by the Surveyor-general, nor by any officer of the land department, until said patents have been declared null and void by a court of competent jurisdiction; neither should any steps be taken which will prevent a full inquiry into all of the facts in relation to the locations, improvements, and continued occupation of the unpatented portion of said claims. For the purpose of determining the rights of the claimants to such portions of the claims as are unpatented, a hearing before the local officers should be ordered, after due notice to all persons in interest, at which testimony may be admitted to establish the rights of the first claimants thereto, and of the second claimants to establish their rights of relocations thereon.

If it should be made to appear that the claims located under the act of 1866 had been abandoned, and the tracts therein included thereby rendered subject to relocation, the application of the relocators should be allowed, unless adverse claims shall be filed during the period of publication, and suits commenced as required by law, in which case all proceedings before your office should be stayed until the question of title shall finally be determined by the court.

On the other hand, if it be shown that said claims had not been abandoned prior to such relocation, then the applications, under the act of 1872, must be rejected.

In such investigation, inquiry may be made into all matters of alleged irregularity, informality, and fraud, in connection with the applications under the act of 1866. I do not deem it my duty, at this time, to pass upon the validity of any of the papers transmitted, further than to state that some of them appear to be irregular, and to require a satisfactory explanation. Inasmuch as some of the papers transmitted, upon which the investigation must be made, are alleged to be forgeries, I am of the opinion that all of said original papers should be retained in your office. Should copies of these papers be required at the hearing before the local officers, they should be prepared, and transmitted to the register and receiver, without unnecessary delay.

The papers transmitted with your letter of the twelfth ultimo, and other papers since received in said cases, are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

Commissioner of the General Land Office.

No. 17. Instructions to Deputy Mineral Surveyors in States where the Commissioner of the General Land Office is *ex officio* Surveyor-general.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 8, 1880.

HENRY MOTZ, Esq., *Huntsville, Alabama.*

SIR: The bond filed by you as United States Deputy Mineral Surveyor for Alabama was received unaccompanied by any letter of transmission, and was inadvertently misplaced and overlooked until receipt of your letter of the third instant. Said bond is satisfactory, and you are hereby appointed Deputy Mineral Surveyor as aforesaid.

In the discharge of your duties under this appointment, you will be governed by the instructions herein, and by the circular instructions from this office.

No official survey will be made, except upon application of a claimant, or his duly authorized agent.

Must make arrangements with claimant for payment of services.

The claimant must in all cases make satisfactory arrangements with the United States Deputy Mineral Surveyor for payment for his services and those of his assistants in making the survey, and the United States will not be held responsible for the payment of any portion of the same.

Initial point of survey.

In making a survey of a mineral claim you will begin at some corner of the public surveys, and run a line by surface measurement, when possible, to a corner of the claim, designating the corner as "Corner No. 1, beginning."

Should the nature of the country make it impossible to run said line by surface measurement, it may be established by traverse or by triangulation.

Courses.

From corner No. 1, you will proceed with the survey of the claim, giving courses and distances of the exterior boundaries, establishing a corner at each angle of the survey, and marking every intersection of the boundary lines with the United States surveys and with conflicting claims.

Corners.

You will describe the corners fully, stating whether a post or stone, the size, depth in the ground, and how marked.

Marks.

The corner monuments will be marked No. 1, No. 2, etc., as you proceed with the survey; also with the number of the survey.

Notes.

You will note all objects crossed by your lines of survey, such as prior surveys, lodes, ditches, ravines, or lines of public surveys. You will note all shafts and their depths, all adits, cuts, drifts, shaft-houses, mills, etc., and represent the respective locations of the same upon the plats.

The mining act approved May 10, 1872 (section 2324, United States Revised Statutes), requires that in all mining locations subsequent to May 10, 1872, "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." In your field-notes, there-

fore, you will note and describe the monuments which mark the *location*.

Report.

After describing fully the improvements on the claim you will give your opinion in regard to the actual value thereof.

You will give the names of adjoining claimants, if any, and state the quarter section, township, and range in which the claim is situated.

On the plats the section lines will be represented in *black* ink; the quarter section lines in *red*.

The field-notes will be made on paper of uniform size.

Plats.

The plats will be prepared upon paper twelve by sixteen inches in size inside the marginal line, allowing outside of such line a margin for binding.

In each case four (4) plats and one (1) copy of the original field-notes will be transmitted to this office for approval.

When the same shall have been examined and approved, the original field-notes will be retained in this office, one copy of the plat will be transmitted to the Register of the proper land district, to be retained on his files for future reference, and two plats and one copy of the field-notes will be returned to you to be handed the applicant, to be disposed of as follows:

1. One copy of the plat to be posted on the claim.
2. One plat and the copy of field-notes to be filed by the applicant with the Register and Receiver, with his application for patent.

Accompanying the plat and field-notes transmitted by you to this office for approval, you will forward the affidavits of at least two responsible parties that an amount of not less than five hundred dollars ($500) has been expended upon the claim in actual labor and improvements. The nature and extent of the improvements should be specified.

Great care should be exercised to have the corners and distances expressed in the field-notes correspond with those represented upon the plat.

Your attention is directed to circular instructions, herewith inclosed, dated November 20, 1873, November 13,

1877, and September 13, 1878; also circular of April 1, 1879, containing the United States mining laws, and regulations thereunder.

Survey of coal claims unnecessary.

Coal lands are subject to sale only by legal subdivisions, and no survey of such claims is to be made in the manner provided for lode claims; also placer claims are when possible to be located by legal subdivisions.

Please acknowledge receipt hereof.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 18. SURFACE GROUND TO BE INCLUDED IN ENTRY.

1. Exclusion may be made of portion within exterior boundaries of survey of claim, included in prior survey of another claim.
2. No exclusion for streets, gardens, etc.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 26, 1878.

Register and Receiver, Central City, Colorado.

GENTLEMEN: The papers in some instances coming up from your office, in the matter of applications for patents under the mining act, fail to disclose the *amount of surface ground* for which patent is sought.

This is particularly true where the survey of the claim for which a patent is sought conflicts with a prior survey, a town lot, or the claim of another party.

Application for all or a portion of surface within exterior boundaries.

In each case the application and the published notices should state whether the applicant desires patent for the entire surface ground embraced within the exterior boundaries of his survey. In case a survey conflicts with a town lot, garden, or road only, the applicant should be required to make payment for the entire area embraced by the exterior boundaries of his survey.

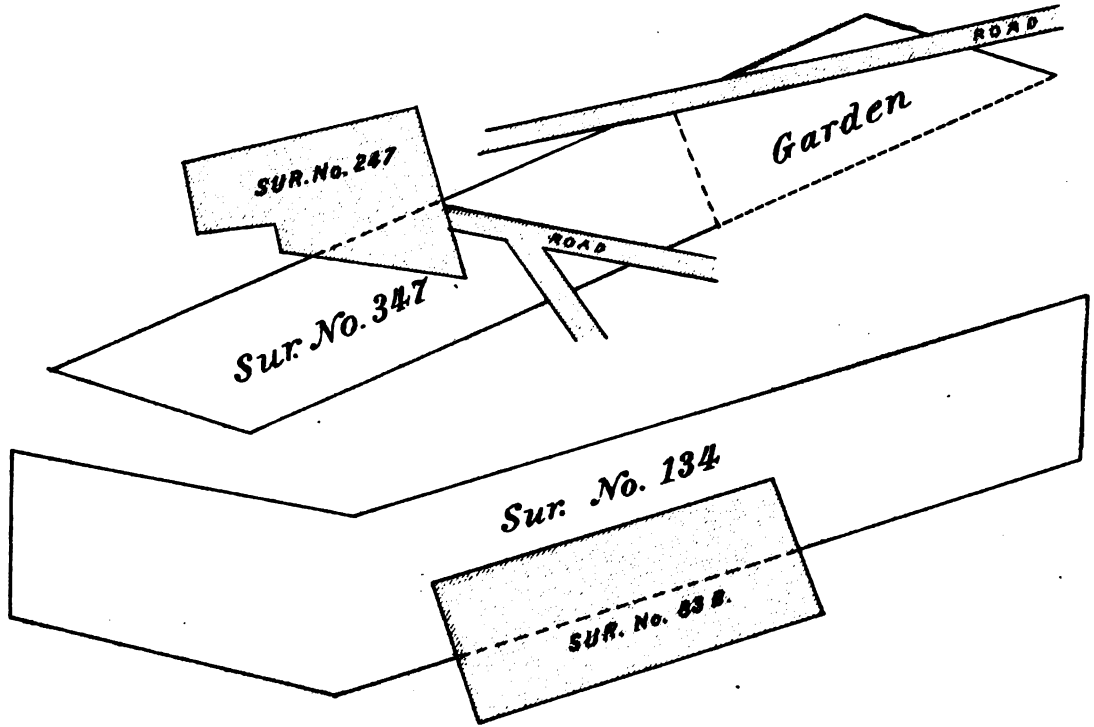
If, however, a survey conflicts with another survey made for a mining claim, viz., for a lode claim, a placer claim, or a mill site, the application and published notice should clearly state whether the applicant seeks patent for the surface ground in conflict with such other survey.

As an instance: where the papers fail to disclose the amount of surface ground for which patent is desired, your attention is called to entry eight hundred and fifty-two, lot one hundred and thirty-four, which lot conflicts with lot eighty-three, B. As instances where lots, gardens, and roads have been erroneously excluded from the areas paid for, by the respective claimants, your attention is called to entry seven hundred and twenty-eight, lot three hundred and forty-seven; entry nine hundred and two, lot four hundred and forty-one; and entry nine hundred and seventeen, lot four hundred and seventy-eight.

You will be pleased to inform all parties in interest, and acknowledge receipt hereof.

Very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner*.


ROAD
Garden
SUR. No. 247
ROAD
Sur. No. 347
Sur. No. 134
SUR. No. 83 B.

CHAPTER V.

ADVERSE CLAIMS.

No. 1. Act of 1866. Adverse claimant not excused for failure to file his adverse claim during the period of publication.

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No. 21. Applicant for patent to show that suit had not been commenced.

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No. 27. No surface conflict. No adverse claim allowed.

No. 28. Act of 1866. No surface conflict.

No. 29. No surface conflict. Side lines against end lines.

No. 30. Survey of adverse claim.

No. 31. Survey of adverse claim.

No. 32. Land department has no jurisdiction to decide that the survey of an adverse claim is not a correct one.

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No. 45. Adverse claim filed with and received by the local officers on Sunday, valid.
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b. Mining claimant to bring the suit, the town site being in possession.
No. 47. Claimant entitled to enter remainder of claim after judgment against him on an adverse claim.
No. 48. Proceeding after determination of suit.
No. 49. Jurisdiction of officer to administer oaths in land district.
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No. 53. Duty of adverse claimant when republication is necessary.
Suit not commenced in time.
Adverse claim treated as a protest. See No. 3. Protest.
Adverse claim not properly sworn to treated as a protest. See No. 5. Protest.
A commissioner of deeds for Nevada, residing in California, not an officer before whom a claimant for a mine in Nevada may make oath of his claim. See No. 6. Protest.
The right to construct a ditch or flume not properly an adverse claim.

No. 1. ADVERSE CLAIM UNDER ACT OF 1866.

The law of Congress provides the manner in which notice shall be given of an application for patent on a mining claim, and nothing further can be required of the claimant. A person claiming adversely is not excused from filing an adverse claim during period of publication because he did not learn of the application.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., February 24, 1871.

SIR: I have received your letter (N) of the ninth day of December last, transmitting the papers in the case of the application of Clinton Reed and Stephen Sanders for a patent, under the mining statute of July 26, 1866, for one hundred (100) linear feet, being claim No. 6 in the Seaton lode, in Idaho Mining District, Clear Creek county, Colorado Territory.

It appears that said Reed and Sanders fully complied with all the terms and conditions prescribed by the second and third sections of that act, and that the Register of the Land Office published a notice of their intention to apply for a patent, in a newspaper published nearest the location of said claim, and also posted said notice in his office for a period of ninety days. At the expiration of that period no

adverse claim had been filed, and the Surveyor-general, upon their application, surveyed the premises and made a plat, and indorsed it with his approval on the tenth day of September last, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed.

Payment to the proper officer of five dollars ($5) per acre having been made, together with the cost of survey, plat, and notice, and satisfactory evidence having been given that the diagram and notice had been posted on the claim during the said period of ninety days, and no adverse claimant appearing before the approval of the survey, the Register transmitted to your office the plat, survey, and description. The parties having strictly complied with the requirements of the law, it became the duty of the General Land Office, if no exceptional circumstances occurred, to issue a patent for the claim. It appears, however, that the papers were received from the local office on the twenty-eighth day of September, but that the issue of the patent was suspended by reason of a telegram received on the thirteenth of October from one Amasa A. Potter, requesting you to retain the patent and stating that letters of administration and the adverse claim of a deceased soldier would be sent by mail. The affidavit, received on the twenty-sixth of October, states that said Potter is the administrator of Prescott Russell, who was killed in April, 1864, while fighting bushwhackers in Missouri, in the second regiment of Colorado cavalry; that on the second day of the following September, Ambrose, only brother and next in kin of said Prescott, gave affiant power of attorney to sell the property of said Prescott; that in the year 1865 said Ambrose died intestate, leaving no heirs at law other than Daniel W., Moses B., and Judah R. Russell, residing in Marion, Wayne county, New York; that he is familiar with the mining claim known as No. 6, east of the Seaton lode, for which said Reed and Sanders commenced an application for a patent on the ninth of May, 1870; that at the time the application was made he had been duly appointed administrator of the estate of said Prescott, and that he had left Colorado to visit said heirs to consult with them in relation to the settlement of the estate; that he saw them, and, in

pursuance of their advice and instruction, returned and made sale, under the order of the probate court, of all the estate belonging to said Prescott at the time of his decease, including the said claim No. 6, as appears by the deed for the same, a copy of which he attaches to his affidavit; that he started on the journey to New York on the third of May, 1870, and five days prior to the application for patent by said Reed and Sanders, and that he did not know of the application of said Reed and Sanders until the tenth day of October following, three days after he made sale of the aforesaid property; that he then proceeded to obtain an abstract of title of said claim, which he attached to his affidavit.

On the first of November last, you wrote to the local officers at Central City, that the abstract of title furnished by Mr. Potter, shows the claim to have been located by Prescott Russell, on the second of November, 1861, and that the certified abstract furnished by the applicants for the patent fails to show this, but shows the claim to have been located by said Reed and Sanders, May 27, 1869, and again on the eighth of the following June; and that the abstract furnished by Potter shows the claim to have been located by different parties at various dates, after the location of Russell, and before the location of Reed and Sanders.

Your predecessor, therefore, considered that the right of the applicants to pre-empt or locate the property was not shown to his satisfaction, and he opened the case for a trial upon its merits, in the proper local courts.

The applicants have appealed to this department. Neither the act of Congress, nor the regulations approved by my predecessor on the ninth of August last, confer authority upon the local office, the General Land Office, or this department, to determine adverse or conflicting rights to the possession of a lode covered by a mining claim, under that act. The sixth section prescribes, that where the adverse claimant appears before the approval of the survey, as provided in the third section, all proceedings shall be stayed, until a settlement and adjudication of the right to possession of such claim shall have been made by the courts of competent jurisdiction.

If no adverse claim has been filed within the prescribed

time, it is the duty of the Surveyor-general to make the survey; and if no adverse claimants appear before his approval of it, the right of the applicant to a patent seems to be established, if his proceedings are in good faith, and in strict conformity to law.

The only objection made by Potter rests upon the alleged fact that he had no knowledge of the application of Reed and Sanders, until the tenth day of October.

Congress has only required that the diagram of the vein or lode of quartz, or other rock in place, should be filed in the local office, and posted in a conspicuous place on the claim, together with notice of an intention to apply for a patent. The register shall publish such notice, and post the same in his office in the mode and for a period prescribed by the act. It was for that body to determine how a party claiming adversely should be notified of the pending application. If their requirements have been strictly observed, the want of actual personal notice to a person whose alleged rights may be injuriously affected, affords no just ground for staying the proceedings.* Such a person is bound, at least so far as the department is concerned, if the required notice has been duly given. It is, therefore, entirely immaterial whether, in this case, said Potter did or did not know of the application, until a month after the approval of the survey.

I may remark, however, that on the seventeenth of June last, he made application to the probate court of Clear Creek county, Colorado, to sell the real estate of Prescott Russell. His application was granted, and the purchaser, one Charles H. Myers, obtained all the title which the intestate had in the premises, if the proceedings were in due form and authorized by law. Potter, as the representative of Russell, had, subsequently to such sale, no interest in the property, and he does not make any claim in his own right. He is not interested, therefore, in the subject-matter, and no other party resists the application.

The appearance of an adverse party before the Survyor-general's approval of the survey is the only contingency

* The silence of the first locator, when a subsequent locator applies for a patent, is under the statute a waiver of his priority. Chapman v. Toy Long, 4 Saw. 28.

mentioned in the sixth section, upon the happening of which the proceedings for a patent shall be stayed until the conflicting rights of the parties to the possession of the claim be judicially determined. In the absence of such a contingency, I am of opinion that when the proceedings are in good faith and strictly regular, they can not be rightfully stayed, nor can the applicants be required to assert and establish their rights in the courts. It is true that your bureau possesses a general supervision over its subordinate officers, and is clothed with ample powers to prevent the consequences of fraud and collusion, and to correct irregularities. Cases under this act may occur in which these powers should be exercised; but this case is not one of them, and I am of opinion that a patent should be issued. The papers are returned.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

The Commissioner of the General Land Office.

No. 2. UNDER ACT OF 1866.

1. Suit must be commenced by the adverse claimants. The fact that a suit is pending between same parties, wherein the adverse claimant is the defendant, does not waive the obligation.

2. The law does not require that the application for patent should be under oath.

3. Where local law did not provide the number of feet that might be taken between side lines, but allowed the surface of the lode, patent may issue for an estimated surface.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 22, 1875.

SIR: I have examined the contested case of The Bullion Mining Company v. The 420 Mining Company, involving title to a portion of the Comstock lode, Virginia City land-office, on appeal from your decision of August 19, 1873.

The facts in the case, so far as material to the present inquiry, are substantially as follows:

November 6, 1867, the Bullion Company, by Thomas C. Williams, president, filed in the local office an application for patent for all that portion of the Comstock lode, with its dips, spurs, angles, and variations, lying between north and south boundary lines, as delineated upon an accompanying diagram; said premises being more particularly described

as follows, viz.: "The northern line of the mining ground of said company, being also the southern line of the mining ground of the Chollar Potosi Silver Mining Company, has a direction north seventy-three degrees and forty-six minutes west, and south seventy-three degrees and forty-six minutes east, and passes through a post eight inches square (number one), in the city of Virginia, county of Storey, and State of Nevada, from which stake number one the north monument of the Hale & Norcross Silver Mining Company's mining ground bears north twenty degrees and forty-eight minutes east, one thousand eight hundred and six and two one-hundredths feet. The southern line of said mining ground has a bearing north seventy-three degrees and twenty-one minutes west, and south seventy-three degrees and twenty-one minutes east, and passing through a point bearing south sixteen degrees and fourteen minutes west, one thousand six hundred feet from the first-mentioned point (number one)." From this description are excepted certain premises, lying in the southern portion of the tract comprised within these end lines, the same having been previously sold by the said Bullion Company, and being then known and described as the claim of the Exchequer Silver Mining Company. The application alleged that the Bullion Company had occupied and improved the above described claim since the year eighteen hundred and fifty-nine, in accordance with the local laws, rules, and customs of miners in the Virginia and Gold Hill districts, in each of which a portion of the claim is situated; that they have expended in actual labor and improvements over one thousand dollars; that the local laws, customs, and rules did not allow any surface-ground, except that covering the vein or lode; that the walls of the lode were unascertained and could not then be located; that the lode was bounded on each side by the walls of the same; and that the estimated area of the surface-ground was one hundred and eleven acres. The diagram accompanying the application shows the end lines described, and the general direction of the lode, but does not give any side lines.

March 2, 1868, the company filed the affidavit of one Philip Lynch, publisher of the Gold Hill Daily News, a daily newspaper published in Gold Hill, to the effect that

the notice above described was regularly published in said paper for the full period of ninety days, viz.: from November 14, 1867, to February 20, 1868.

October 22, 1872, the company also filed the following described papers, viz.; 1. A certified copy of articles of incorporation as a mining company, dated February 11, 1863. 2. The affidavit of Samuel Owen and George Arcularius that the notice and plat, copy attached, were, in the presence of affiants, between the fifteenth and eighteenth days of November, 1867, duly posted upon the premises in a conspicuous place, viz., upon the north end of the company's hoisting-house, six hundred feet south of the north boundary line, and remained so posted for the full period of ninety days—that is to say, for more than six months thereafter. 3. An affidavit by George W. Hopkins, dated October 14, 1872, that he had been Secretary of the Bullion Company for nine years; that during this time said company had expended upon the claim in labor and improvements over half a million dollars; that work thereon by said company, or its grantors or predecessors, had been constant since 1863, except for about two months in 1870; that the company claim under a location made by V. A. Houseworth and others, known as the Crosser & Company's claim, and among other sources of title, through a deed by said Crosser & Company, dated May 11, 1865; that said deed was never recorded, but was accidentally destroyed by fire on the nineteenth day of November, 1871; that said deed had been introduced in evidence and filed in a certain suit in one of the local courts of Nevada, on the twentieth day of May, 1865; that it was afterwards withdrawn from the files of the said court, and a copy thereof substituted, and that a paper annexed to affiants' affidavits was a true copy of the copy referred to. 4. An affidavit by D. Bixler, the then attorney for the company, that said deed was in his possession, and was destroyed by fire as above recited. 5. An abstract of title, certified by the county recorder of Storey county, showing original location of the Crosser & Co. claim, recorded June 27, 1859, and subsequent conveyances, which, with the deed referred to by the affidavits of Hopkins and Bixler, established a perfect title in the

Bullion Company to the premises claimed as early as May, 1865.

January 13, 1873, the said company filed the following described papers in the local office, viz.: 1. Receipt of publisher of Gold Hill Daily News, showing payment by the company for advertising application for patent. 2. Affidavit of Samuel Owens that he was foreman of the Bullion Mine for four years ending in April, 1868, and that during this time said company occupied and improved said mine, and expended thereon upwards of three hundred thousand dollars. 3. Affidavit of E. A. Schultz, dated January 13, 1873, that for about two years he had been superintendent and manager of the Bullion Mine, and that during this time the said company had occupied and improved the same, and expended thereon not less than one hundred and seven thousand dollars. 4. Certified copy of the mining laws of the Gold Hill and Virginia mining districts.

February 4, 1868, within the period of the publication by the Bullion Company of their notice and application, the 420 Mining Company filed an adverse claim, which was signed and sworn to by C. J. Lansing, attorney for the said company. It alleged that the said 420 Company was a corporation organized under the laws of the State of California; that it was the owner and for nine years prior thereto had been in possession of four hundred and twenty feet of the lode known and called the Comstock lode by said Bullion Company; that the northern line of said 420 Company's mining ground was the southern line of the Chollar Potosi claim; that the claim of the said 420 Company commenced at the said southern line of the Chollar Potosi claim, and ran south four hundred and twenty feet on the Comstock ledge, including all the dips, spurs, angles, and variations thereof, and that four hundred and twenty feet of the ground claimed by the said Bullion Company was the mining ground of the said 420 Company and in its possession. The protest further alleged that prior thereto a suit had been commenced by the said Bullion Company against the said 420 Company to recover possession of the premises in question, and that such suit was then pending.

June 3, 1873, the 420 Company filed in your office a certified copy of its certificate of incorporation, dated June 23,

1863, and an affidavit by C. J. Lansing, dated March 25, 1873, reciting substantially the averments of the protest, and further affirming that the grantors and predecessors of said 420 Company had expended large amounts of money and bestowed much labor on the mine; that in 1859 the original locators of said lode conveyed one half of the claim to certain parties upon condition that the conveyance should be valid when ore was found; that said parties did find ore therein in 1859; that thereupon title to one half of said claim vested in them; that at divers times between 1859 and 1863 the then owners of the said 420 claim performed labor thereon amounting in the aggregate to over five thousand dollars; that since the organization of the 420 Company in 1863, it had expended upon the mine about thirty thousand dollars; that the said company and its predecessors and grantors had during all of this time held and possessed the premises claimed; that the company derived its title from the said Crosser Company, under location made June 23, 1859, as fully set forth in the application of the Bullion Company; that affiant is informed and believes that shortly after said location and prior to September 15, 1859, the locators partitioned said claim and staked out said partition on the ground; that five of said locators were to have the premises now claimed by the 420 Company, and that the others were to have the balance of the claim lying to the south; that possession was taken under such partition and in accordance with its terms; that being so in possession, said locators, September 15, 1859, conveyed one half thereof, as heretofore mentioned; that to affiant's knowledge the said 420 Company long since acquired all title heretofore held by said five locators by proper deeds of conveyance duly made and recorded prior to any deeds to the Bullion Company.

Prior to all the proceedings above recited, to wit, on the sixteenth day of November, 1865, an action was brought in the local courts by the Bullion Company against the 420 Company, which, after repeated continuances, and under circumstances not fully shown by the record, but wholly immaterial in this case, was dismissed, on motion of counsel for the plaintiff, June 3, 1872.

November 29, 1872, being nearly six months after the

above dismissal, the 420 Company commenced an action against the Bullion Company in the District Court for the First Judicial District of Nevada, which resulted, August 21, 1873, in a judgment for the defendant, all questions of fact having, by consent of counsel, been submitted to the court. The court found all the facts, both as to title and possession, in favor of the defendant, the said Bullion Company. From this decision the plaintiff appealed to the Supreme Court of the State of Nevada, which tribunal, May 4, 1874, unanimously affirmed the decision of the court below.

January 18, 1873, the local officers allowed the Bullion Company to enter the land shown by their plat of final survey, which plat included twenty-six and sixty-four one-hundredths acres surface ground, lying on both sides of the lode.

August 19, 1873, you examined the case, and decided that the adverse claim of the 420 Company was valid, and that proceedings should be stayed until an adjudication of the rights of possession by the local courts. From this decision an appeal was taken by the Bullion Company. Pending this appeal a copy of the judgment roll was filed, showing the decision of the Supreme Court of the State of Nevada in favor of the Bullion Company, as already recited; upon consideration of which, the case was returned to your office August 29, 1874, the action of the local courts therein being considered as final.

January 12, 1875, the 420 Company filed in your office a certified copy of a writ of error in said case, from the Supreme Court of the United States to the Supreme Court of the State of Nevada, bearing date December 28, 1874. You, January 13, 1875, again transmitted the case to this office.

Without at this time deciding the specific point raised by the appeal, viz., whether the protest filed was good in law, I deem it sufficient for the purposes of the present investigation to say that the present status of the case is not such as to require or justify a further stay of proceedings.

Suit brought by adverse claimant.

In my opinion the law requires that suit or action be

commenced *by the adverse claimant* in order to entitle him to a stay of proceedings. The act of 1872 expressly requires it to be done within thirty days from the filing of the adverse claim, and the act of 1866, upon a fair construction, requires it within a reasonable time. The adverse claim in this case was filed February 4, 1868, and no suit or action was commenced by the adverse claimants until over four years and a half thereafter, to wit, November 29, 1872. This was certainly not within reasonable time. The fact that an action was pending in the local courts, in which the Bullion Company was plaintiff and the 420 Company defendant, did not relieve the latter company from the obligation imposed by the statute. That proceeding was within the control of the plaintiff, and could at any time have been terminated by a withdrawal of the suit, or by submission to a nonsuit. Under such circumstances there would have been no final adjudication of the rights of possession as required by the act. That particular suit would have ended, but no final adjudication would have been reached. And this is precisely what occurred in this case. The plaintiff withdrew its suit, and left the question as to the right of possession just where it was before. It had nothing to lose, and perhaps something to gain by this move, and by making it simply and properly exercised a strict legal right. A similar result, working a practical defeat of the provisions of the statute, is liable to occur at any time in this class of cases, if it be held that the pendency of a suit against a protestant relieves him from the duty of making himself plaintiff in another suit.

The evident intent of the statute was to stay proceedings only when the protesting party, within a reasonable time, commences, and with reasonable diligence pursues, his remedy against the claimant. This construction of the act was adopted by your office, and included in your instructions to the local officers under date of June 25, 1867, prior to the filing of this adverse claim, and in my opinion, it is the only consistent construction of which the language is susceptible. I am, therefore, of opinion that the 420 Company have not complied with the law in this respect, and for this reason are not entitled to a further stay of proceedings.

But admitting, for the sake of argument, that said company have complied with the law in the respect suggested, I am still of opinion that a further stay of proceedings should not be granted, for the reason that all questions as to the right of possession of this claim have been finally adjudicated in "courts of competent jurisdiction."

The case was tried in the District Court for the First Judicial District of Nevada, the court having original jurisdiction in this class of cases. The court found, as matter of fact, that the Bullion Company had title to the land in contest; that the 420 Company had no title, and that the Bullion Company had been in exclusive possession since the year 1865. Judgment having been entered for the defendant, and appeal having been taken, the appellate tribunal, the highest in the State, unanimously affirmed the decision of the court below. The department, in 1874, as I have already mentioned, considered this as a final adjudication by "courts of competent jurisdiction," and I see no good reason now for changing the opinion then expressed. I do not understand that the Supreme Court of the United States has jurisdiction over this class of cases upon writ of error. It certainly can not change the facts found by the court below. These facts conclusively establish the right of the Bullion Company to the possession of this lode under local laws, so far as that question can be considered by the department in connection with a possible further stay of proceedings. The department is only authorized to stay proceedings until the right of possession has been finally adjudicated in the courts of competent jurisdiction. I think such rights have been so finally adjudicated where facts are finally found which unmistakably control their disposition.

The 420 Company having failed to commence suit within reasonable time after filing its protest, and its suit, when brought, having, so far as the questions before the Department are concerned, being finally decided in favor of the defendant, the said company is not entitled to any further stay of proceedings.

The adverse claimants, however, claim the right to show, independently of their adverse claim, that the Bullion Company has not complied with the law, and is not there-

fore entitled to a patent. As both these claims were located and all the proceedings herein were commenced under the act of 1866, it is not entirely clear that these adverse claimants have the legal right to appear and make the objections above named; but I have concluded to treat them in the light of *amici curiæ*, and I shall carefully consider the points suggested by them, premising that the law should be more liberally construed in favor of the applicants for patent under such circumstances than in the presence of an adverse claim.

1. One of the objections urged is that the application of the Bullion Company was not sworn to, and that the same was not accompanied by the proof required by the act.

Application not under oath.

This defect is not, in my opinion, fatal. Neither the statute nor the instructions under it required that the application should be under oath, and, in my opinion, it was not necessary, in the absence of an express declaration of law to that effect. The proof required to support the claim, although not filed at the time of the application, was afterwards submitted. If this were a defect in the original application, it was cured before the case was closed at the local office. It was not such an omission as misled the adverse claimants, and no one was injured by the filing of the additional proof.

2. It is further claimed that the application was invalid, because it failed to designate the specific surface ground claimed.

The second section of the act of 1866 provides that the diagram filed shall be "so extended, laterally or otherwise, as to conform to the local laws, customs, and rules of miners." It is clear that the application, of which the diagram is, in fact, a part, must allege the claim as required by such local laws, customs, and rules, and that, if no surface ground is provided for, a failure or omission to state the amount claimed, by specific description, is not a defect in pleading. This is the plain effect of the language used, and was the construction adopted by your office in its instructions to the local officers, already referred to.

The claim under consideration was located June 23, 1859,

the entire premises claimed being then within the limits of the Gold Hill mining district, having a regularly adopted code of laws. This district was subsequently, during the year 1859, divided, and the now Virginia district created therefrom. This last-named district adopted a code of laws September 14, 1859. The Bullion claim lies partly within each of these districts.

Upon a careful examination of the laws, of both Gold Hill and Virginia districts, I am unable to find any provision whatever giving surface-ground to quartz or ledge claims. Section thirteen of the Gold Hill laws is as follows, viz.: "All quartz claims shall not exceed three hundred feet in length, including the dips and spurs."

Custom.

Article one of the Gold Hill laws is as follows, viz.: "All quartz claims hereafter located shall be two hundred feet on the lead, including all its dips and angles." There are no other provisions whatever relating to the quantity or extent of lode claims, and no provisions relating in any way to surface-ground, except such as are evidently intended to apply to placer locations. It is clear, however, that it was the custom or rule in these districts to take as surface for quartz claims all the ground lying between the two walls of the lode.

The application under consideration expressly alleged that the local laws, customs, and rules did not permit any surface-ground to be occupied, except the surface of the vein or lode; that the walls of the lode were at that time unascertained and unascertainable, but that the surface of the premises claimed was the surface of said lode, estimated at one hundred and eleven acres. The lode itself, so far as known, was accurately described in both application and diagram.

I think this application describes the claim as the law required that it should be described. It literally follows your instructions issued under the act then in force. That act required the diagram to be so extended as to conform to local laws, and the local laws allow just such a claim as is described, and none other.

I am not entirely clear that to have been more explicit

would not have made the claim liable to the very objection now urged.

3. It is still further claimed that the premises applied for are not those actually located.

The location recorded in the Gold Hill district, June 27, 1859, was in the following words, viz.: "Notice: We, the undersigned, do claim eight claims two hundred feet square, including quartz and surface, commencing at the above claim and running south." Signed by nine locators.

It is evident from an inspection of this notice, as literally copied in the record, that the locators were unlearned men. The notice is vague, uncertain, and in itself almost unintelligible. The only fact it clearly shows, when considered in connection with the local laws under which it was made, is that the locators intended to claim sixteen hundred feet of the lode. This uncertainty is not surprising, when it is remembered that the location was made long prior to any of the mining laws of the United States, at a very early day of the imperfect system of local laws. The claim for two hundred feet square for each locator was not authorized by the local laws, customs, or rules, and was invalid for so much as attempted to appropriate surface ground, unless that portion was intended merely as an estimate of the surface of the lode, in which case it would not be a controlling call. The subsequent conveyances by the locators all describe the claim more particularly as *so many feet upon the lode south from the Chollar claim.*

This location is the only paper in any way connected with the case that attempts to specifically locate the surface claimed or allowed.

I am satisfied upon full consideration of all the facts presented that the real intent of the locators was to claim sixteen hundred feet of the lode running south from the Chollar Potosi claim, in conformity with and in the manner prescribed by the local laws, customs, and rules, and the location notice ought to be so understood and construed. As thus construed it is not in conflict with the application.

4. It is still further and finally claimed that the survey now before me, upon which a patent is asked, does not conform to the survey and diagram of the original claim. This

objection is in substance that the approved survey does not embrace the premises located and applied for.

The survey in question adopts the end lines, as described in the application and diagram, viz., on the north the south line of the Chollar Potosi, and on the south the north line of the Exchequer, embracing nine hundred and forty-three and seven-tenths feet of the Comstock lode. The said north line is one thousand two hundred and thirty-one and thirty-two hundredths feet in length. The said south line is one thousand three hundred and thirty-six and sixty-five hundredths feet in length. The side lines connect the end lines just described, the east of said side lines being nine hundred and fifty-two feet in length, and the west of said side lines being one thousand and six feet in length. The area of the survey is twenty-six and fifty-five one-hundredths acres. The field-notes contain the following general description of the lode, viz.: "The width of the lode is unknown, but a point 'A' on the four hundred and fifty-five foot level, a point 'B' on the five hundred foot level, and a point 'C' on the one thousand four hundred foot level, shown on the accompanying plat, are accepted as being embraced in the lode." Point "A" is a short distance east from the west boundary; point "B" is a little west from the center of survey; and point "C" is a short distance west from the east boundary. The width of the lode, as thus set out by this designation of surface-ground, corresponds with the adjoining claims of the Chollar Potosi and Exchequer companies, which claims were patented without side lines, except the undetermined walls of the lode, so far as the surveys of such claims establish stakes or monuments on the south and north lines respectively.

This survey conforms almost literally to the location and application. It may, perhaps, be open to the objection that it is not in conformity to law, and therefore can not be patented; but however this may be, there is certainly no material variation between the location and application and the final survey. All the proceedings from the beginning show a claim for a certain number of feet on the lode, with the estimated quantity of surface-ground over it. This is exactly what is represented by the survey.

I have now arrived at a point in this investigation where

it is necessary to consider whether this survey can be patented under existing laws.

No definite side lines.

I think that it can be so patented. The only objection is the absence of specific side lines to the claim as originally presented. As I have already said, the local laws allowed no surface-ground, except the surface of the lode. The walls of the lode have never yet been ascertained or determined. Under these circumstances I see no way of disposing of this evidently meritorious claim, except to patent it for an estimated surface, or to grant the lode with right to the surface over it, and leave the question of the extent of such surface to be afterwards determined. The former, I think, is the preferable course.

The survey in question, I think, is a fair estimate of the surface of the lode, and as nearly correct as it is possible to make it under the circumstances. It does not conflict with any other claims, and is far more satisfactory than many surveys already patented upon this lode. I have accordingly concluded to direct that a patent issue upon this survey; but to avoid any complications which may possibly arise under the provisions of the act of 1872, a reservation will be inserted in such patent, reciting the fact that the surface ground described is the estimated area of the lode, and that only the actual surface ground embraced within the walls of the lode is intended to be conveyed.

I direct that you issue a patent to the Bullion Company on the survey now before me, with the reservation mentioned.

The papers transmitted with your letter of the thirteenth of January last, are herewith returned.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

To the Commissioner of the General Land Office.

No. 3. CASE UNDER ACT OF 1866.

1. Both applicant and adverse claimant are bound by the published notice.
2. Location notices are not held to technical accuracy. If sufficiently certain to put honest inquirer on notice, they are sufficient.
3. Objection that notice was not published for full legal period must be raised before patent issues.

4. Adverse claimant is entitled to have patent issued to him for the premises in controversy, upon filing certified copy of the judgment roll, but for lands not in controversy, and for which he applies for patent, he must advertise a notice.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 1, 1875.

SIR: I have carefully considered the application of Samuel S. Walker et al., owners of the Prince of Wales mine, situate in Big Cottonwood mining district, in Salt Lake county, Utah, to have proceedings instituted, in the name of the United States, to set aside and annul the patent issued to Allen Schenck and Norris W. Mundy for the Highland Chief mine, situate in the said Big Cottonwood district, and also the like application of John M. Moore et al., owners of the Wandering Boy mine, in the aforesaid mining district, to set aside and annul the patent for the said Highland Chief mine.

I have also considered the several applications made by Schenck and Mundy to have proceedings instituted in the name of the United States to set aside the patents heretofore issued to the said Samuel S. Walker et al., for the Prince of Wales and Wandering Boy mines; and also the patent issued to J. R. Walker et al. for the Antelope mine.

All of the above-named mines are located in the same neighborhood, and are of such supposed value as to have induced, between the respective claimants, protracted and heated contests before this department. I shall follow the example of counsel, and treat all the applications as consolidated, and shall dispose of them in the order in which they are above named, premising that I have not the time that would be necessary to dwell in detail upon all the various alleged defects that have been commented upon by the learned counsel who have appeared and made oral arguments before me. I shall endeavor to omit none that are material.

1. The Prince of Wales against the Highland Chief.

The Prince of Wales location was made August 1, 1870, and recorded in the proper mining district August 3, 1870. The Highland Chief location was made and recorded in the proper mining district September 12, 1870.

The Prince of Wales made application for patent for one thousand two hundred linear feet of the lode, with surface

ground of one hundred feet in width, December 30, 1870. The Highland Chief filed an adverse claim against the Prince of Wales with the Register at Salt Lake, July 29, 1871, having filed on the twentieth of June its application for a patent. On the ninth of November, 1871, the Register transmitted to the Commissioner of the General Land Office the application of the Highland Chief, and accompanying papers, but for some reason he neglected to transmit the application of the Prince of Wales.

On the seventh day of September, 1871, the Prince of Wales filed an adverse claim against the Highland Chief, but it was rejected because not sworn to. Afterwards, January 8, 1872, it filed another adverse claim, duly sworn to, but this was not done until after the period of publication had expired. The acting secretary, on appeal, April 13, 1872, held that the adverse claim of the Prince of Wales should be rejected because not filed within the period of publication. June 22, 1872, a patent issued to Schenck and Mundy for the Highland Chief.

It appears from the foregoing statement that the Prince of Wales was first located and recorded, and that it made the first application for patent, and that the Highland Chief filed an adverse claim thereto after the period of publication had expired. If this application and adverse claim had been forwarded to the commissioner by the local officers, as they were bound to do under the instructions, the adverse claim would have been rejected because not filed within the period of publication. The fault was not that of the Prince of Wales, and it ought not to suffer by the neglect of duty of any official. (Railroad v. Smith, 9 Wall. 99.)

The Highland Chief afterwards made application for patent while that of the Prince of Wales was pending. The Prince of Wales filed an adverse claim after the period of publication had expired, and the Highland Chief for that reason caused its rejection. In other words, the Highland Chief, by the decision of this department, struck out and got rid of the adverse claim of the Prince of Wales for the very reason which should have excluded its adverse claim to the Prince of Wales application. The Prince of Wales had the prior right and the prior location, and it was manifest error in this department to allow the Highland Chief to

transpose the condition of the parties, and thereby materially change the rights of the contending parties.

2. It is claimed that the patent for the Highland Chief did not follow the final survey in this, to wit: that its final survey did not include any of the surface-ground of the Prince of Wales, while it is conceded that the patent did include all the surface-ground where the Highland Chief crosses the Prince of Wales and the discovery shaft of the Prince of Wales and many of its valuable works.

The field-notes of this survey made October 5, 1871, upon this point are as follows: "From post No. 2, I run N. fifty-three degrees E., nine hundred and nineteen feet to Prince of Wales claim, one thousand two hundred feet, leave Prince of Wales claim." And again: "From post No. 4, I run S. fifty-three degrees W., two hundred and fifty-eight feet to Prince of Wales claim, four hundred and ninety-five feet; leave Prince of Wales claim."

The natural construction of this language is, that the spaces between the nine hundred and nineteen and one thousand two hundred feet on one side and two hundred and fifty-eight and four hundred and ninety-five feet on the other side were omitted. If they were, the description is correct. If there is doubt whether they were omitted or not, it is proper to explain that doubt by the testimony of experts in surveying. Mr. Freeman, the deputy United States mineral surveyor, who made this survey, testifies that he did omit the surface premises of the Prince of Wales, and that he intended so to do. This is highly probable from the nature of the case. He found the Prince of Wales in the actual occupancy of this surface-ground. He saw that it had its discovery shaft and valuable mining works upon it, and he probably knew that the Prince of Wales was the first locator, inasmuch as he was a surveyor and familiar with the mines in that location.

He would, therefore, very naturally pass over the premises, and exclude them from his survey, unless he had directions from his employers to do otherwise. I do not think that he had any such instructions, and my reason for so thinking will appear when I come to consider another branch of this subject. It is true that Freeman, in making up the area of his survey, did not exclude from such area the surface-

ground of the Prince of Wales, amounting to 24-100 of an acre. It probably escaped his recollection when he came to make his plat. In my judgment the weight of the evidence shows that the surface-ground was excluded from the survey. It should therefore have been excluded from the patent, and it was error to include it.

It is claimed that the final survey and patent of the Highland Chief did not follow the original application and notice, and that the claim was floated to the eastward so as to include the discovery and works of the Prince of Wales.

The Highland Chief was located September 12, 1870. In the location notice the lode is described as "commencing at the discovery stake, and running six hundred feet in a *southerly* direction and six hundred feet in a *northerly* direction therefrom. * * * Situate about five or six hundred feet *westerly* from the young Columbia and Wandering Boy lodes, Big Cottonwood district, Utah Territory."

A location five hundred or six hundred feet westerly from the Wandering Boy lode would exclude the premises now in controversy.

The diagram of the Highland Chief, attached to its application for patent, represents the Prince of Wales and Wandering Boy Lodes as lying to the east of the premises claimed by the Highland Chief. The application and publication notice both allege that "from discovery shaft the lode extends north-easterly six hundred (600) feet, and south-westerly therefrom six hundred (600) feet. There are no known adjoining claimants at either end; the nearest known claims being the Prince of Wales and Wandering Boy mines, *on the easterly side of said lode.*"

Parties are bound by the notice.

Under such an application and published notice, it is very clear to my mind that the applicants had no right to go to the eastward so as to take in and appropriate the mines which they allege are on the "easterly side" of their lode. The object of requiring notice to be given by publication is to inform all parties who may have an adverse interest of the premises sought to be acquired, so that they may appear and assert their rights. If the notice describes premises in which others have no interest, then such other

persons may safely neglect to appear and set up any claim. They are bound by the notice, and, if they neglect it, they must do it at their peril; but the moment they find that the notice does not ask for anything in which they have an interest, that moment they may safely sleep, if they please. They are not bound, and should not be bound, to look after subsequent proceedings for fear that there may be a subsequent claim set up to their property. There can be no subsequent claim that varies materially from the original one, which is embodied in the application and publication. The law must be followed. The proceeding is a special statutory proceeding, and all the provisions of the law must be carefully and, as some authorities say, strictly pursued. Actual notice without publication will not answer. Written notice would not be sufficient, because the statute says that there must be notice by publication.

Premises not described can not be claimed without new publication.

If the published notice described certain premises, none other can be afterwards claimed and appropriated without a new application and new published notice, and if there should be a subsequent effort to include premises other than those included in the original application and notice, and an adverse claimant should appear and assert his claim to the new premises thus sought to be appropriated, and should fail in maintaining his claim, either by reason of not filing the same in time or for defect in form, he would not, in my opinion, be thereby in any worse position than he would have been if he had not appeared at all. In this class of cases consent can not give jurisdiction. It is a substantial compliance with the statute which alone can give jurisdiction.

As we have seen, the location, application, and published notice of the Highland Chief severally excluded the premises of the Prince of Wales, now in controversy. It further appears, from the testimony on file, that the owners of the Highland Chief, in the early stages of their proceedings for patent, did not intend to include the Prince of Wales mine.

Mr. Stevenson, who was the surveyor that made their original diagram, testifies that he was instructed to avoid the Prince of Wales, and that he did so. There is nothing

in the case that indicates any intention on their part to appropriate it until after they discovered that the final survey might be construed to include it, and they had succeeded in excluding its adverse claim. I think it was error to include it in their patent.

THE WANDERING BOY.

This mine was located and recorded August 6, 1870, and before the Highland Chief. Its owners have made an application like that of the Prince of Wales. The Highland Chief crosses their surface-ground, and they ask that proceedings may be commenced in the name of the United States to set aside its patent. From what has already been shown, it appears that the Wandering Boy was excluded from the location, and application, and notice by publication of the Highland Chief, and for these reasons it also should have been, but was not, excluded from the patent to the Highland Chief.

I am therefore of opinion that the applications of the Prince of Wales and Wandering Boy should be granted, unless the applications made by Schenck and Mundy to set aside their patents should be granted, and I will proceed to consider them.

1. The Prince of Wales.

To this claim it is objected that its location is void for uncertainty. The notice of location is as follows:

"The Prince of Wales lode.

"Discovered by Thomas E. Owens, August 1, 1870. We, the undersigned, in company and undivided, claim one thousand two hundred feet on the above lode or mass of ore, or whatever it may contain, two hundred feet for discovery, and one thousand feet for location along this vein, wherever it may run, together with all dips, spurs, angles, and variations, with all the privileges granted by the laws of the district, and the Congressional laws of the United States. This lode is situated on the right-hand fork of the creek known as Silver Fork, within about two hundred feet in a south-easterly direction of the lode called the 'Antelope,' in Big Cottonwood canyon, and now supposed to run in a south-westerly and north-easterly direction.

"*Discovery*—Thomas E. Owen, 400; H. W. Bishop, 200; T. Robinson, 200; S. J. Despain, 200; H. Burnette, 200."

Location notices not held to technical accuracy.

In considering the question now presented, it should be borne in mind that the discovery of lodes, and the preparation of location notices for the same, are generally made by unlettered men, and it would be productive of great hardship, and perhaps generally result in an entire loss of their valuable discoveries, if they were held to technical accuracy in their notices of location. Accordingly, it has been uniformly held by the courts and this department that extreme liberality should be shown to these notices, and if they were sufficiently certain to put an honest inquirer in the way of ascertaining where the lode was, that was sufficient. I think the present notice is reasonably certain, and that its *locus* could be found from the description given.

It is much more certain than many locations that have been carried into patent even when contested.

2. It is objected that the application for patent and the final survey and patent do not conform to the original location.

That parol evidence is admissible to aid in the location of a mining claim and define what tract is embraced in a location is well settled. (Com'r G. L. O. Instructions of Nov. 20, 1873; Kelly v. Taylor, 23 Cal. 14.)

The testimony of four deputy mineral surveyors and four others, their attendants, has been filed in this case, and shows that they have made a careful survey of the premises, and find that the location, application, and patent are for substantially the same premises. These persons have the means of knowing, and have no motive that I can see for misstating the facts. This objection, I think, is not supported by the weight of the evidence, and is therefore overruled.

3. It is objected that the proof of publication of the notice of intention to apply for patent was published *from* January 6, 1871, *to* April 6, 1871, a period of only eighty-nine days, including both the first and last days of publication.

Objection as to duration of publication of notice must be raised before patent issues.

One of the vices of this objection is, that assuming the

facts as stated, and the publication was for ninety days instead of eighty-nine, that raises the vexed question whether the first or last day, or either, should be excluded in the computation; and upon that point the authorities are numerous on both sides, although it is the rule of this department that the first should be excluded. (Eureka case.) But this objection, if made at all, should have been made before patent, and it is too late to make it after the patent has issued. (Curtis on Pat., sec. 274.)

4. It is also objected that the proof of posting the notice and diagram on the claim does not show when, where, or for what period the same was posted.

The counsel who make this objection refer to the affidavit of John Dobbie and George Murray to sustain the same.

These persons both state "that of their own certain knowledge they are aware that a certain diagram was and has been posted for the period of ninety days, subject to the inspection of all whom it may concern, upon that certain mining ground lying, being, and situate in Silver Fork, Big Cottonwood canyon, Big Cottonwood mining district, Salt Lake county, Territory of Utah, and known and recorded as the Prince of Wales lode; and that said diagram is a true and correct copy as made from survey of said ground, and now on file in the land office in Salt Lake City, said survey and diagram having been filed for the purpose of securing and obtaining a United States patent for the premises as hereinbefore mentioned, viz., 'The Prince of Wales, by Thomas Butterwood,'" etc.

This affidavit is not as specific as it should have been as to when the period of ninety days commenced, but the objection should have been made before patent.

5. It is objected that the applicants for patent did not have the title to the claim at the time the application was made, and that they did not acquire it for some time thereafter, and that, therefore, their application was absolutely null and void.

It is clearly shown that they acquired title in due form by conveyances before the patent issued. It is not shown that they had no interest in the claim at the time the application was made, but on the contrary it is alleged by counsel that they had contracts for conveyances before the

application was made. This is highly probable. It is extremely improbable that business men would commence an application of this kind without having any interest in the premises or mine claimed.

Title acquired before issue of patent.

If they acquired full title, as they did before the patent issued, it is not void, and the irregularity is not such as would justify commencing proceedings to set aside the patent.

6. It is further objected (and this is the last objection insisted upon) that the application for patent was made by Thomas *Butterwood et al.*, but that the final certificate of entry was issued to Thos. *Butterfield et al.*, and that as the patent issued to Thomas Butterwood et al., it is illegal and void.

Thomas Butterwood was, without the possibility of a doubt, the true name of one of the applicants. His name and his genuine signature appear frequently in the papers. There is nothing to show that he ever transferred or pretended to transfer his interest to Thomas Butterfield. The officer in issuing the final certificate, by inadvertence and mistake, issued it to Thomas Butterfield et al., when he intended to issue it to Thomas Butterwood et al. I entertain no doubt upon this point, and I am equally clear that this clerical error ought not to and does not affect the validity of the patent.

THE WANDERING BOY.

1. It is objected that the location and application for patent and final survey do not agree.

The notice of location is as follows:

"The Wandering Boy Lode.

"Notice is hereby given that we, the undersigned, claim fourteen hundred (1,400) feet on this lode, lead, or mass of ore for mining purposes, supposed to run in a north-easterly and south-westerly direction, situated about three hundred feet east of the Antelope, in the head of Silver Fork, Big Cottonwood canyon, Big Cottonwood mining district, claimed with all dips, spurs, angles, variations, metals, and minerals along the course of the ore wherever it may extend, together with all the privileges granted by the laws

of the United States and the local laws of this district. Located August 6, A. D. 1870. To be held jointly and undivided, discovery included. Claim nine hundred feet up the hill, and five hundred feet down the hill from discovery.

"W. S. Hullinger, John M. Davis,
"L. B. Clements, H. C. Hullinger,
"A. Livingston, A. D. Hullinger,
"Wm. McGhie."

The application for patent describes the premises as follows:

"We * * * do claim fourteen hundred (1,400) feet in length by eighty-five (85) feet in width on the Wandering Boy lode (being a silver-bearing vein of rock in place), and the land and premises appertaining to said mine, * * * the location and extent thereof being more fully described as follows, to wit:

"The discovery shaft is N. 17° E. 1,928 feet from U. S. mineral monument No. 1, and about 70 feet southerly from the main shaft of the Prince of Wales lode at the head of Silver Fork canyon; thence S. 69° W. 300 feet; thence S. 51° 30′ W. 200 feet to the south-westerly end of the vein, the shaft of the Highland Chief mine bearing north-westerly; return to discovery shaft; thence N. 69° E. 280 feet to summit of divide between Silver Fork and Honey-comb canyons; thence N. 34° 30′ E. 620 feet to north-easterly end of mine."

In this case, as in the Prince of Wales, resort has been had to parol evidence to determine the location of the claim. Four deputy mineral surveyors and their four attendants swear that the location, application for patent, and final survey are for substantially the same premises, and I find from the testimony that their statements are true, and I therefore overrule this objection.

2. It is objected that the proof of publication does not state the last day of publication, and therefore does not show that the law was complied with.

The affidavit of Frank Kenyon, editor of the paper in which the notice was published, states that "the attached notice was published in the *Salt Lake Review for a period of ninety days*, commencing August 15, 1871." I think this

was sufficient *prima facie* proof. The objection is overruled.

3. It is objected that the notice and diagram were not posted on the claim until five days after they were filed in the land office, and five days after the publication had been commenced.

The proof shows that they were posted on the claim for more than ninety days, commencing on the twentieth day of August, 1871. They should have been posted before the publication, but the omission was an irregularity only, and was not fatal.

4. It is alleged that upon a survey including an area of two acres an entry was made, and the two acres paid for, and that subsequently the survey was modified so as to include an area of two and seventy-five one-hundredths acres, and that a patent issued in accordance with the modified survey, without correction of certificate or payment for the three quarters of an acre.

This would result in depriving the government of five dollars.

Perhaps it would be sufficient to answer *de minimis non lex curat;* but as I understand the matter, the final survey, after deducting the premises belonging to the Prince of Wales and paid for by it, will leave just about two acres, which was the amount paid for by the Wandering Boy.

5. It is alleged that the patent issued without proof that the original locators were citizens of the United States.

It is not claimed that there was proof that the applicants for the patent were not citizens.

It has not been the practice of the land office to require proof that the original locators were citizens, except in those cases where they were the applicants for patent. It will not be presumed that they were not citizens, in the absence of any allegation or objection before the issuing of patent to that effect. After patent has actually issued it is too late to make this objection. (Kempton case.)

6. It is objected that the patent illegally recites that the prior patent for the Highland Chief, for the premises in conflict, was inadvertently and erroneously issued.

I think that the patent to the Highland Chief for said premises did inadvertently and erroneously issue, and that

it was proper to recite that fact and issue another patent to the Wandering Boy for said premises.* (Stark v. Starrs, 6 Wall. 402; Henshaw v. Bissell, 18 Id. 264). But as counsel for the Highland Chief strenuously contend that a second patent can not properly issue, and as there can be no question about the right to proceed in the name of the United States to set aside a patent improperly granted, I have concluded to request the Attorney-general to institute such suits in behalf of the Prince of Wales and Wandering Boy.

I will notice, in passing, the objection that has been urged to the application in case of the last-named mine, on the ground that Moore & Co. had transferred all their interest in the mine to Walker et al., before this application was made.

I find from the exhibits before me that Moore & Co. still have some interest in seeing that the patent to the Wandering Boy is unclouded, and I think that interest sufficient to support their application.

THE ANTELOPE LODE.

The location of this lode was made on the fifteenth of June, 1870, and recorded June 18, 1870. It was as follows:

"THE ANTELOPE LODE.

"June 15, 1870. Miner's Notice.

"We, the undersigned, claim (3,000 ft.) three thousand feet in this ledge or lode, with all its dips, angles, spurs, and variations, to be known as the Antelope lode. Also, (200 ft.) two hundred feet discovery, running (1,000 ft.) one thousand feet easterly, 2,000 westerly direction, situate at the head of the first south fork below mill, known as Mill F, in the right-hand fork of said fork.

"Discovery.

"Levi H. North, Levi North, C. A. North, H. B. North, Marari North, E. H. Williams, H. B. Fuller, A. L. Fuller, R. Miller, A. Ivans, John M. Cook, John Cook, Wm. H. Homer, A. J. Alexander, W. S. Hullinger."

* See Moore v. Robbins, 6 Otto, 530; also, decision of the G. L. O., Sierra Nevada Co. v. Union Consolidated Co., No. 13, wherein this rule is changed.

NOTE.—This decision is given because of the interesting points decided under the act of 1866. The practice of issuing second patents, while the first remains outstanding, has been discontinued in the General Land-office.

The application for patent was made on the thirtieth of December, 1873. Publication was made in the Salt Lake Tribune, commencing on the fourth of January, 1874. Messrs. Schenck and Mundy, the owners of the Wellington lode, filed on the fourth of March, 1874, an adverse claim.

The case was heard by the Commissioner of the General Land Office in June, 1874, the parties being permitted to make oral and written arguments. On the eighteenth of August, 1874, the applicants for patent of the Antelope lode filed in the General Land Office an abandonment in writing of all that portion of their claim covered by the adverse claim of the Wellington. The commissioner thereafter treated the Wellington claim as out of the case, and thereupon informally decided that the applicants were entitled to patent, and on the twenty-sixth of August, 1874, a patent was issued for the Antelope lode, excluding the premises claimed by the Wellington. No notice of this decision was given to the owners of the Wellington or their attorneys. They claim that they should have had notice, and that they had the right of appeal to the Department, which right had been cut off by the neglect to give them notice and by the issuance of the patent. They allege that they desired to appear and protest against the issuing of patent to the claimants for sundry reasons, showing that the applicants had not fully complied with the law. They instance the following: That their location notice did not describe their claim as minutely as the local laws required, in that it did not name the starting point, and did not show that the locators marked their claim with stakes or hillocks, with the names of the claimants on a distinctly written notice; that they failed to show that the locators had done twenty-five dollars worth of work within ten days after recording their claim; that they failed to show that one of the locators (not one of the applicants) was a citizen of the United States; that the requisite amount of improvement and expenditure was not done on the claim, but was done on another—the Prince of Wales; that the notice and diagram were posted on the Prince of Wales instead of the Antelope; that they failed to show that the publication notice was given in a paper designated by the register; that no final survey of the claim, as patented, was made; that the claim was floated; and,

over all and above all, that the filing of the adverse claim required that *all proceedings* should be suspended until after the judgment of the court had been rendered.

The Antelope lode as originally located, covered a portion of the premises afterwards included in the patent to the Prince of Wales. Those portions of the claim not so included, and perhaps others, were patented to the Antelope claimants.

That there were irregularities in issuing the patent for the Antelope, I shall not deny. Some of them were of trivial importance, and others of a more grave character.

The question now presented is whether they were such as to require this department to institute proceedings to set aside the patent. If any person was wronged by the issuing of the patent it ought to be set aside.

If there are no adverse interests, then it seems to me that there is no good ground for interference with the patent. There is no pretense that any adverse interests have been injuriously affected, except those of the Wellington claimants. It is argued that they have good ground to complain that the seventh section of the act of May 10, 1872, requires that all proceedings shall be stayed until the suit brought by the Wellington claimants has been acted upon by the courts.

This claim will require a careful examination of the statute and of the spirit or reason for the same.

The seventh section is as follows:

"That where an adverse claim shall be filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of the adverse claim. After such judg-

ment shall have been rendered, the party entitled to the possession, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the Register of the land-office, together with the certificate of the Surveyor-general, that the requisite amount of labor has been expended, or improvements made thereon, and the description required in other cases, and shall pay to the Receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the Register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear from the decision of the court to rightly possess. If it shall appear from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor-general, whereupon the Register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights." * * *

This section expressly provides that when an adverse claim has been filed in the manner therein pointed out, "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisriction, or the adverse claim waived." It requires the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to *determine the question of the right of possession to the premises* claimed adversely, and to prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of the adverse claim.

The object of this provision evidently is to *protect* the rights of the adverse claimant in the disputed premises and to determine the right of possession thereto, and to prevent the land department from issuing a patent for the premises in dispute to the wrong party.

Now, if the applicant for patent comes forward and says to the Land Department, I concede that the adverse claim-

ant has the better right, and I hereby give up all claim to the premises in controversy, and consent that they shall be excluded from my patent, and included in the patent to the adverse claimant, what is to be gained by continuing the suit?

If it should proceed to final judgment, it could only determine that the adverse claimant had the right of possession to the matter in dispute.

That result has already been accomplished by the waiver on file in the department. It is true that the words of the statute have not been *literally* followed, but the spirit has, and *hæret in litera, hæret in cortice.*

This principle has been well expressed by a learned court in the following language:

"It frequently becomes the duty of courts, in order to give effect to the manifest intention of the statute, to restrain, or qualify, or enlarge the ordinary meaning of the words that are used. The intention of the law-makers may be collected from the cause or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute, unless within its intention. The *letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter.*" (4 Bac., Title Stat. 1, secs. 38, 45, 50; Burgett v. Burgett, 1 Ohio, 221.)

And again: "Courts are not to be confined to the letter of the law in giving a construction. The maxim, *hæret in litera, hæret in cortice,* is not to be forgotten. A statute must be construed with reference to the subject-matter of it, and its real object and true intent." (Spicer v. Gesleman, 15 Ohio, 341.)

It seems to me that this department is not required to await the action of the court when the thing to be accomplished by the action of the court has already been accomplished by full admission of the adverse claim in the Land Department.

The abandonment in writing is a confession in favor of the adverse claimant, and if he should desire the benefit of a formal judgment of the court, he has but to file therein a

certified copy of the abandonment to obtain a judgment by confession.

I do not agree with the construction of this seventh section, insisted upon by counsel for the motion. The only matter that could be legally presented to the court would be such as related to the premises in controversy. It would have no power to adjudicate upon anything else, and if it should undertake to do so, its judgment in that regard would be *ultra vires* and void. The mere fact of bringing the suit by the adverse claimant, and obtaining a judgment in his favor, does not necessarily give him a right to a patent by filing a certified copy of the judgment-roll and the certificate of the Surveyor-general, and paying for the land and paying the fees. He may commence his suit immediately, and before the publication of notice has expired, during which other adverse claimants are allowed to file their claims. The statute requires that the publication of notice shall continue and shall not be stayed. If during its publication other adverse claimants should appear and file their claims, after the suit has been brought by the first adverse claimant, it is very clear that the judgment in favor of the first applicant would not give him the right to a patent upon filing a certified copy of the judgment-roll, etc., and yet he would have complied with the letter of the law. It would be necessary for him to make all of the other adverse claimants parties to his suit before he could, as against them, claim the benefit of the statute. He could not in any other way satisfy the spirit of the statute, though he might the letter.

Advertisement required of adverse claimant when only a part of premises in controversy.

In the case under consideration, the Wellington claimants will be deprived of no affirmative rights. They may go on with their suit and obtain judgment, and file a certified copy of the judgment-roll, etc., and obtain their patent, but it will be for the premises in controversy only, and not for their entire claim. Congress, in my opinion, never intended that a patent should issue for any mineral lands where an application for patent had not first been advertised and notice given. If the Wellington claimants, by virtue

of having filed their adverse claim to the Antelope, would be entitled to a patent for their entire claim, then they would acquire a patent for premises for the greater portion of which no notice of application had ever been given. A construction that would result in such consequences is wholly inadmissible.

I overrule the application to commence proceedings to set aside the patent for the Antelope lode. I shall request the Attorney-general to institute proceedings in the name of the United States to set aside and cancel so much of the patent to the Highland Chief as conflicts with the patents heretofore issued to the Prince of Wales and the Wandering Boy.

I have given to the many questions involved in this case all the consideration which my time would permit, and the conclusion which I have reached will result in bringing into court the owners of the Highland Chief, where they will have full opportunity to protect all their rights.

You will advise the parties of the foregoing decision.

Very respectfully,

C. DELANO, *Secretary.*

Hon. Commissioner General Land Office.

No. 4. ACT OF 1866.

1. The law makes it the duty of the Register to publish the notice of application for patent.

2. The final survey should substantially follow the claim described in the application.

3. Adverse claims must be filed during the ninety days period of publication.

4. The Supreme Court of the United States has rendered a decision in this matter. See No. 9, Decisions.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., December 5, 1871.

SIR: I return herewith the papers transmitted with your letter of the fifteenth ultimo, in the matter of the Salt Lake Mining Company's application for certain lands in the Flagstaff lode, Little Cottonwood Mining District, Utah Territory. You rejected the notice on the grounds of incorrect published notice and incorrect survey.

After a careful consideration of the subject, I am of opinion that the defects in the published notice were not of so material a character as to require it to be set aside;

and your decision is modified to this extent. I entirely agree with your opinion that the errors of the survey are such as to forbid its approval.

The inclosed copy of the opinion of Assistant Attorney-general Smith on the case, in which I fully concur, sets forth at length the reasons of this decision.

I am, sir, very respectfully,

Your obedient servant,

C. DELANO, *Secretary*.

Hon. WILLIS DRUMMOND, *Commissioner, General Land Office*.

[Inclosure.]

DEPARTMENT OF JUSTICE,

OFFICE OF ASSISTANT ATTORNEY-GENERAL,

WASHINGTON, November 24, 1871.

SIR: I have considered the appeal of the Salt Lake Mining Company from the order of the Commissioner of the General Land Office refusing to issue a patent for the "Flagstaff lode," so called.

The Commissioner based his rejection of the application upon two grounds:

1. The notice published by the Register did not correspond in its description of the premises with the notice and diagram filed with the Register.

2. The survey made by the Surveyor-general did not correspond with and include the premises set forth in the claim and diagram filed with the Register.

First. The notice, application, and diagram, filed with the Register, described the discovery shaft of said lode as distant north 47° 15′ west two thousand two hundred and eighty-one feet from United States monument number 4. The published notice described it as distant north 47° 15′ two thousand two hundred and eighty-one feet from United States mineral monument "A." The application described the lode as extending from the discovery shaft south 36° west one thousand two hundred feet, and north 36° east one thousand four hundred feet. The published notice as extending south 37° one thousand two hundred feet, and north 36° one thousand four hundred feet.

It thus appears that the published notice failed in these instances, of giving the bearing from the meridian, and left it uncertain whether that bearing should be east or west.

It gave one course as 37°, when it should have been 36°, and described the starting point as monument A, when it should have been 4.

It will be observed that the notice in the first three particulars agrees with the application *so far as it goes.* It is consistent with the application to the extent it states the courses and distances, but fails to state the courses in full. It omits one of the bearings from the meridian. If there were nothing referred to in the notice to help out the patent defects in it, I think it would not be such a notice as the law requires.

An examination of the notice, however, shows that it states that the company "has this day filed in this office a diagram of the same, together with a notice of an intention to apply for a survey," etc.

The "diagram" and "notice" referred to contain a true description of the premises, and, as I think, *help* out and cure the defects referred to and patent in the published notice, upon the well-established maxim *id ceratum est quod reddi potest ceratum.* The error of one degree, in giving the course as 37° when it should have been 36°, is so slight and would make so little difference in the distance of 2,600 feet, that it is not entitled to consideration. *Lex non curat de minimis.* The remaining discrepancy is the one which makes the starting point monument A, instead of monument No. 4. This, in my opinion, is the most serious of all. Upon inquiry, I learn that there are, in fact, no mineral monuments that are designated by the letters of the alphabet. Practically, there was but little danger of any one's being misled by such a notice. Upon its face it would be seen that it called for a monument that was unknown in the mineral districts, and the inquirer would be led to examine the diagram referred to in the notice, and upon such examination would discover the error and ascertain the true monument.

Register's duty to publish notice.

Moreover, the law does not impose upon the applicant the duty of preparing and publishing the notice. This is made the duty of the Register. It is claimed by counsel that the applicant is not responsible for any errors made by

the officer of the law in giving such notice. I think the officer is made for this purpose the agent of the applicant, and that it is the business of the applicant to see that he substantially complies with the law. The object of notice is to advise those who may have adverse interests of the pendency of a claim that may affect their interests, and it will not answer to say that the applicant shall not be responsible for the notice, or that he shall receive his patent, although the officer entirely neglected to give any notice. But while I would not release the applicant from all responsibility for the notice, yet, inasmuch as it is made the legal duty of the Register to prepare and give it, I would not hold the party to the same technical precision that I would if the law made it his duty to give the notice.

Upon the whole, I think the notice in question was not so irregular or defective as to justify setting it aside.

Second. By an examination of the application and official survey made in this case, it will be seen that they do not correspond.

The application was for a claim extending from the discovery shaft south 36° west 1,200 feet, and from the same point north 36° east 1,400 feet. The official survey was for a tract extending from the discovery shaft south 49° 39′ east 1,200 feet, and north 45° 39′ west 1,400 feet.

Assuming that the discovery shafts were identical, and there is a variation in the course of 81° 39′, making the two tracts cross each other nearly at right angles, the application started at a given course and distance from monument No. 4, the survey at a given course and distance from monument No. 3. Whether the two monuments were in fact identical is not shown.

Survey should conform to application.

I am of opinion that the final survey should substantially follow the claim described in the application. I think this did not, and I advise that the decision of the Commissioner be reversed as to the published notice, and affirmed as to the final survey.

Very respectfully,

W. H. SMITH, *Assistant Attorney-general.*

Hon. C. DELANO, *Secretary of Interior.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 14, 1872.

SIR: I have had under consideration the appeal from your decision in the matter of the Flagstaff lode, in Utah Territory.

The only ground on which you declined to issue a patent was that certain adverse claims had been filed with the Register after the expiration of the ninety days from the date of the published notice, and before the approval of the corrected survey.

It appears that the notice was published on the fourth day of June, 1870, and one of the adverse claims was filed on the twenty-eighth of December, 1871, and the other on the tenth of January, 1872.

The original survey was approved by the Surveyor-general on the eighteenth of September, 1871. The corrected survey was approved on the sixteenth of January, 1872. The original was not approved by the Commissioner or Department, because it did not conform to the original application and diagram in this, to wit: the application and diagram purported to start at a given course and distance from mineral monument No. 4, and the survey at the same course and distance from mineral monument No. 3.

The application and diagram represented the surface premises to extend from the discovery shaft south 36° west twelve hundred feet, and north 36° east fourteen hundred feet. The survey represented the tract as extending from the discovery shaft south 49° 39′ east twelve hundred feet, and north 45° 39′ west fourteen hundred feet.

There was then no evidence in the case showing that mineral monuments Nos. 3 and 4 were identical. Now that fact is clearly shown, and it is also shown that the corrected survey corresponds with the original application and survey, and that the original survey covered the identical discovery shaft now contained in the corrected survey, and that both the original and corrected surveys cover the identical discovery shaft set forth and included in the application and diagram.

Adverse claim filed after approval of original survey—When new survey is ordered.

I state these facts for the purpose of showing that the ad-

verse claimants are not prejudiced by the filing of the corrected survey, for it covers the identical discovery shaft included in the original published notice, which notice they disregarded. They did not file any adverse claim under it, within ninety days from its publication, or at any time. If they could safely admit to file, under that notice, it seems to me that they can safely do so under the present corrected survey. The original survey was approved before any adverse claim was filed. That survey was not set aside. It was ordered to be corrected. It has been corrected. It may well be doubted whether it, as corrected, is such a new survey as would permit the filing of an adverse claim between the dates of the approval of the original and the approval of the corrected survey, even admitting that the law allowed adverse filings at any time before the approval, and did not limit them to ninety days from the publication of the notice.

But does the law permit such adverse filings after the expiration of ninety days from the publication of the notice?

The second section of the mining act of July 26, 1866, provides that the claimant who has previously occupied and improved a vein or lode, and expended in labor or improvements not less than one thousand dollars, shall file, in the local land office, a diagram of the same, so extended laterally, or otherwise, as to conform to the local laws, and that it shall be lawful for him to enter such tract and receive a patent therefor.

The third section provides that upon the filing of the diagram, as provided in said second section, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the Register of the Land Office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office, for the period of ninety days: "and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the Surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to

the proper office of five dollars per acre, together with the cost of such survey, plat and notice, and giving satisfactory evidence that said diagrams have been posted on the claim during said period of ninety days, the Register of the Land Office shall transmit to the General Land Office said plat, survey, and description, and a *patent shall issue therefor.*"

Adverse claims filed after period of publication.

The plain meaning of this is, that the Register shall give the notice required for the period of ninety days, and that parties having adverse claims shall have the entire ninety days in which to file their claims, and that upon the expiration of the ninety days, immediately upon its expiration, the very next day thereafter, *if there have been no adverse claims filed,* the claimant shall have the right to apply to the Surveyor-general for a survey, and upon its being approved, and the land paid for, and the proper papers forwarded to the Commissioner, he shall be entitled to his patent. Ninety days is given in which to file adverse claims.

They must be filed within that period. This is certainly a reasonable notice. It is much longer than publication is generally required by State laws, to bring in absent parties and acquire jurisdiction over important interests.

Is this rule, thus clearly stated, changed by the sixth section of the same act?

That section provides, "That whenever any adverse claimants to any mine located and claimed as aforesaid shall appear, before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement, and adjudication in the court of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases." The object of this section is, to declare what shall be done when an adverse claim has been filed. It is not to declare when an adverse claim shall be filed.

That had already been done in the third section. It recites, that when "any adverse claimants" * * "shall appear before the approval of the survey, as provided in the third section of this act," then all proceedings shall be stayed, etc. Of course it must be "before the approval of the survey," if done in accordance with the third section, for

that section requires the adverse claim to be filed within the ninety days. Any other construction would allow an adverse claim to be filed at any time before approval of the survey. A survey might be in the main correct, but yet erroneous in description or otherwise, in some slight particulars, and yet in such a case an adverse claim might be filed which of itself would suspend the approval of the survey until it was adjudicated. Another claim might be filed before that was disposed of or the survey approved, and thus adverse claims might lap over each other, until it would be almost an impossibility for a claimant to be in a condition where he could demand an approval of his survey and the issuing of his patent.

A construction which leads to such consequences ought not to prevail. I have concluded to adopt the one which requires the filing to be made within the ninety days.

Your decision is, therefore, reversed, and the papers, together with your letter of the twenty-eighth ult., herewith returned. Very respectfully,

C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND, *Com'r General Land Office.*

No. 5. ACT OF 1866.

1. The rule requiring adverse claims to be filed within ninety days from commencement of publication of notice, fully settled.

2. Where the final survey covers premises not included in the advertisement, and in which third parties have an interest, such third parties may appear at any time before patent issues, and call attention to the record, and show that no patent should issue.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 28, 1874.

SIR: I have examined the case of John Tiernan et al. v. The Salt Lake Mining Company, applicants for patent for the Lavinia Lode, in the Little Cottonwood Mining District, Utah Territory, on appeal from your decisions of December 6 and 16, 1872. Two grounds are relied upon for a reversal of your decisions:

1. It is claimed that you erred in rejecting the adverse claim of the said John Tiernan et al. to the "Grizzly," "Baltic," and "Pocahontas" Lodes because the same was not filed within the period of ninety days from the commencement of the publication of notice; and

2. That you erred in refusing to allow them to present a caveat against the issuing of a patent for the Lavinia Lode, and to submit testimony showing that the application for patent for said lode ought not to be granted.

Rule requiring adverse claims to be filed within ninety days, fully settled.

Upon the first point, I have no hesitation in approving your action. The rule excluding such adverse claims has been so often applied by this Department, that it must now be regarded as fully settled.

Upon the second point, I observe that there is a material difference between the original application and notice and the final survey, in accordance with which you had, before appeal, issued patent. The object of giving notice by publication is to afford an opportunity to appear and be heard, against the application, to all persons who may be injuriously affected by the issuance of a patent for the premises claimed. When a proper notice is given, parties in interest who fail to appear and object, do so at their peril. If they do not appear, it is their own fault. They have had ample opportunity and have neglected it. They can not do so with safety, unless the advertisement covers claims in which they have no interest. If it does, they certainly should not be required to appear and watch the further progress of the case, lest premises should be substituted which were not contained in the notice, and which may include valuable mining interests of their own.

If they carefully examine the notice during the period of publication, and find that it does not describe premises in which they have an interest, they may safely dismiss the subject, and conclude that they can not be prejudiced by any subsequent proceedings in the case.

Third parties may call attention to the record.

Should it happen that the parties and officers, after the publication of the notice, improperly and illegally change the description of the premises so that the final survey covers premises not included in the advertisement, and in which third parties have an interest, then, in my opinion, such third parties have the right to appear, at any stage of the proceedings before patent, and call the attention of the

tribunal having jurisdiction over the subject to the fact that *the record* shows that the applicant has no right to a patent for the premises included in his final survey, for the reason that he has not given public notice for the period required by law, of his intention to apply for a patent for such premises. The notice he did give described other premises.

In the case now under consideration, Tiernan et al. appeared in time and made the proper objection to the sufficiency of the case of the Salt Lake Mining Company, as shown by the record. Their objection can not now be considered, because patent has issued. I think substantial justice can be done to all parties by allowing the said Tiernan & Co. to show, when their application for patent for the said "Grizzly," "Baltic," and "Pocahontas" Lodes reaches you, that their right to said lodes, or either of them, or any part of them or either of them, is superior to that of the said Salt Lake Mining Company, and that the portion of the same so found superior to the right of said Salt Lake Company has been included in the patent issued by you to the said company, and thereupon for you to issue a patent, to the said Tiernan et al., for the portion so found superior in right, as aforesaid, reciting therein the fact that a former patent had inadvertently and erroneously issued for the same to the said Salt Lake Mining Company, and you are hereby instructed so to do.*

I return herewith the papers transmitted with your letter of the twenty-fifth of November, 1873.

Very respectfully,

C. DELANO, *Secretary.*

Hon. W. DRUMMOND, *Commissioner General Land Office.*

No. 6. CLAIM PRESENTED UNDER ACT OF 1866.

1. A protest is a challenge of the applicant's own showing, and through it no trial of unascertained rights is authorized.

2. The right to a patent is determined upon the papers filed by the applicant, and upon the records of the land office.

3. The patent for a claim presented under the Act of 1866, conveys the surface-ground within the exterior boundaries of the survey and the particular lode named in the patent.

* The rule here announced, of issuing second patents while the first is outstanding, is not now in force, having been changed under authority of the decision of Secretary Chandler in case of Jno. W. Harbinson, July 12, 1876. See, also, decision of U. S. Supreme Court in Moore v. Robbins, 6 Otto, 530.

4. A patent for a claim pending under the Act of 1866, on the tenth of May, 1872, conveys all the rights acquired under the Act of 1866, together with all other veins or lodes, etc., to the extent provided by the third section of the Act of May 10, 1872.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 17, 1874.

Messrs. BRITTON, GRAY & DRUMMOND, *Washington, D. C.*

GENTLEMEN: On the fourth instant a decision was rendered by this office in the matter of the application of Samuel Watson et al., for patent for the Seven-Thirty Lode, Colorado, in which occurs the following recital: That "it is also shown that the Hercules Lode does not follow the surface-ground patented to said company throughout its entire length, but that it leaves the surface near the south-westerly end of the survey of the surface-ground, and underlies a portion of survey No. 136."

It is then held as follows: "The United States having conveyed to said company the entire surface-ground embraced by said survey No. 112, and three thousand linear feet of the Hercules lode, in accordance with the provisions of the mining act of July 26, 1866, a clause will be inserted in the patent to said Watson et al. for said claim when issued, excepting from the conveyance the surface-ground and lode conveyed to said International Mining and Exchange Company by said patent, dated September 3, 1872."

On the seventh instant you filed in this office a "protest" against said decision, quoting, and particularly objecting to the following sentences of the before mentioned recital, viz.: "It is also shown that the Hercules lode does not follow the surface-ground patented to said company throughout its entire length, but that it leaves the surface-ground near the south-westerly end of the survey of the surface-ground, and underlies a portion of survey No. 136."

Your protest is also understood by its general terms to be directed against the proposed insertion in the patent to the Seven-Thirty lode of a clause excepting from the conveyance the surface-ground and lode conveyed to the said company by patent dated September 3, 1872. * * *

The decision of the fourth instant, against which your protest is made, embraces as findings or official conclusions in the nature of a final judgment of the office:

1. That the applicants have shown compliance with the law, and are entitled to receive a patent; and,

2. That such patent shall issue, but with an excepting clause as to certain surface-ground and lode theretofore conveyed by patent to other parties.

Nothing more than this, which is so in the nature of an adjudication as that it might be held restrictive of or so definitive of rights as to be binding on either parties or privies, is found or intended to be embraced by the recitals of said letter.

The particular recital embraced and quoted in your protest is in the nature of inducement or introduction only to the specific findings that *exception shall be made in the patent.*

The real question involved, therefore, is, Is it the duty of this office, upon the record as it stands, to insert or to omit the exception complained of; and as preliminary thereto, what proofs, proceedings, and records should be considered in reaching a conclusion upon that question?

Office of a protest.

It is conceded that a protest has no such office to perform as that, upon it being filed, any right of intervention accrues save only in the nature of a challenge of the applicant's own showing, or that through its instrumentality any trial of unascertained rights may be authorized.

The assumption that the protest of the Hercules owners has been treated as, or had the force of an adverse claim, is erroneous.

Rights determined upon the record and papers.

It is held that, for ascertaining the proper and necessary recitals of a patent in a given case, the applicant is bound by the terms and disclosures of such filings as conformably with the law he rests his right to enter and purchase upon; and that, for the further ascertainment and protection of rights, and as a duty on the part of the United States, it is held that the examination of this office should, whether protest be filed or not, proceed beyond the papers filed by the applicant, and into those general records of the office which evidence the final disposition made of the public domain; and if upon examination it is found that any part of the premises applied for have been previously disposed of, that

express exception thereof should be inserted in the subsequent patent.

Upon this theory the examination proceeded in this case.

It is found, among other things, upon inspection of the official plat of survey furnished and filed by the applicants for patent for the Seven-Thirty lode, as well as the diagram posted with the notice on the claim, that said claim designated lot number one hundred and thirty-six, and known as the Seven-Thirty lode, does, at its south-westerly end, embrace a portion of the *surface-ground* embraced by said survey number one hundred and twelve, patented to the International Mining and Exchange Company with their claim on the Hercules lode, and that it also covers a part of the *Hercules lode.*

By reference to the record of patents, in this office, it is found that a patent issued on the third day of September, 1872, to the International Mining and Exchange Company for the premises embraced by said survey, number one hundred and twelve, and for three thousand linear feet of the said Hercules lode.

A comparison of said patent and the plat of said survey, number one hundred and twelve, incorporated into and made a part of said patent, with the plat of survey number one hundred and thirty-six, confirms the admitted interference of survey number one hundred and thirty-six with the surface-ground and lode patented to said company with survey number one hundred and twelve.

In other words, the Seven-Thirty applicants ask the United States to sell and convey to them, as a portion of the public domain, a tract of land and certain premises already sold and conveyed. This I decline to do, and hold that in such cases it is the duty of this office to protect the prior patentee by inserting in the subsequent patent such apt words as shall clearly except every right already conveyed.

What patent conveys.

What is granted by the United States to the patentee of a vein or lode claim may be thus stated. A patent granted for a mining claim under the act of July 26, 1866, by the express provision of the act conveys to the grantee therein named the *surface-ground* embraced within the exterior

boundaries of the survey, and the *particular lode* named in the patent for the number of feet patented along the course thereof, with all its dips, angles, and variations, although it may depart from the surface-ground described in the survey and enter the land adjoining.

Where the application for patent was pending under the act of 1866, on the tenth day of May, 1872, none of the rights which the applicant had acquired by virtue of compliance with said act of 1866 were affected or impaired in any way, and patents issued upon applications of this class convey the same rights which were conveyed under the act of 1866, together with all other veins or lodes, the tops or apexes of which lie inside the exterior boundaries of the surface-ground patented, to the extent and in the manner provided by the third section of the act of May 10, 1872.

This question is fully discussed in two opinions rendered by this office in regard to this same Hercules Lode, of date December 26, 1872, one addressed to Hon. J. B. Belford, and the other to L. G. Calkins, Esq.

Conformable with those views it has been the constant and uniform practice and custom of this office in the recitations of its mineral patents to expressly convey the lode or vein named in the patent to the number of feet named, as well as the surface ground described in the patent, and it is deemed proper and just in forming an exception to make it equally broad.

That you may be fully informed upon the matter, it is now decided that the form of exception to be inserted in the patent to Samuel Watson et al., when the same shall issue, will be in the following words, viz., excepting from this conveyance the surface ground and lode conveyed to the said International Mining and Exchange Company by said patent, dated September 3, A. D. 1872.

I have not deemed it of importance to discuss the aptness or otherwise of the language of the recital in my decision of the fourth instant, quoted and objected to by you, since it will necessarily follow, upon the restatement and amplification of the whole case, that the patent to be issued will follow the ascertainment of rights as now expressed.

Having with due care examined all the papers in the case, together with the brief and protest filed by you, I

conclude that my decision of the fourth instant was correct, and in accordance with the law, and as herein amplified and explained it will stand as the decision of this office.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 7. Adverse claim to placer mine, under act of July 9, 1870.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 24, 1874.

Register and Receiver, Helena, Montana.

GENTLEMEN: On September 23, 1870, Jordan W. Hyde et al. filed in your office an application for patent for certain placer mining ground in township 1 north, range 2 west, embracing seventy-eight and one half acres.

Before the expiration of the ninety days' notice by publication, G. B. Wood et al. filed an adverse claim against said application.

On the fifth of April, 1872, a decision was rendered by this office in said case, allowing the adverse claimant thirty days within which to commence suit in the proper court to adjudicate the right of possession to the premises in dispute.

On the twenty-fifth of April, 1872, you notified all parties in interest of said decision, and suit was commenced in accordance therewith, on the twenty-first of May, 1872.

On the twenty-second day of November, 1873, in open court, the said adverse claimants "entered their discontinuance of their suit herein, whereupon said court rendered judgment against the said plaintiff for costs."

It appears that the said adverse claimants commenced a second suit against said applicants on the twenty-eighth of November, 1873, bringing into controversy the right of possession to a portion of the premises described in said application for patent.

Where a party makes an application for patent, and shows a compliance with the mining acts of congress, his application for patent will not be indefinitely suspended at the instance of parties who show no desire to have their alleged adverse interests finally determined by the courts.

In the case under consideration, the application has been

suspended nearly four years, at the instance of said adverse claimants, which is certainly as much time as can reasonably be expected.

No suit is now pending which was commenced within the time allowed by said decision of April 5, 1872.

Case will not be suspended upon second suit brought after thirty days.

The only suit now pending was commenced more than eighteen months after the said decision was rendered, and the case will be taken up for final action in its regular order as though no adverse claim had been filed.

You will inform all parties in interest, and acknowledge the receipt hereof.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 8. Adverse claim to lode under Act of July 26, 1866.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 8, 1872.

Register and Receiver, Central City, Colorado.

GENTLEMEN: On the sixteenth of February, 1872, this office directed you to inform Harley B. Morse that thirty days from the date of your notification would be allowed him to bring suit in the proper local court, to adjudicate the right of possession to the Pelican lode, situate in Griffith mining district, Clear Creek county, Colorado.

On the twenty-third of February, 1872, the Register and Receiver at Central City, Colorado, informed Mr. Morse of the ruling of this office in said case, and on the twenty-third of March, 1872, said Morse filed his bill of complaint against said applicants for patent, and summons issued the same day upon said complaint, which summons was served upon said applicants for patent upon the first day of April, 1872.

On the third of April, 1872, said defendants filed their answer to said complainant's bill of complaint.

On the nineteenth day of April, 1872, said suit was dismissed on complainant's motion, and it appears by a certificate of the clerk of the Clear Creek County District Court, under seal, that on the nineteenth day of April, 1872, there was no suit, or suits, pending in said court,

bringing into controversy the title to the Pelican lode, except a suit brought by Charles H. Morris against Eli S. Streeter and Thomas McCunniff.

Morris' adverse claim to said application for patent, not having been filed within the ninety days notice by publication, can not be considered, as will be seen by reference to the decision of the Honorable Secretary of the Interior, dated July 5, 1872, in case of the Pelican and Zillah lodes, copies of which decision have this day been sent to your address.

On the twentieth of April, 1872, H. B. Morse filed a bill of complaint against Eli S. Streeter, John McCunniff, Thomas McCunniff, James R. Hugunin, Robert L. Martin, Silas C. Bennett, Zadock Kalbaugh, Americus Medley, John Dee, John Murley, James O'Neil, Charles Dougherty, Jasper N. Roberts, James Lees, Howard C. Chapin, Joseph H. Rogers, John Shillto, and William H. Cushman, bringing into controversy the title to the said Pelican. From the foregoing it will be seen that Morse commenced his suit on the last day of the thirty days allowed him to commence suit by our decision of February 16, 1872, and that on the nineteenth of April, 1872, he dismissed said suit.

Second suit commenced after thirty days.

The fact that Morse commenced another suit against the applicants for patent and other parties, long after the thirty days allowed in our said decision had expired, will not be considered by this office.

You will, therefore, on the receipt hereof, allow the entry of said Pelican lode to be made, and transmit all the papers in the case to this office.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

Decision of the Secretary of the Interior, affirming the foregoing.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., November 16, 1872.

SIR: I have considered the appeal taken by H. B. Morse from your adverse decision in the case of Harley B. Morse, Eli S. Streeter, and Thomas McCunniff, applicants for patent for the Pelican lode, Central City District, Colorado Territory.

By your decision of February 16, 1872, Morse was ordered to begin suit in the local court, within thirty days after service of notice to adjudicate the right of possession of the mine. The notice was served on him February 23, 1872. He began his suit on the last day of the thirty. The case coming up for trial on April 19, 1872, he moved that it be continued to the next term of the court.

This motion the court denied, "because of there being no equity in said complainant's bill of complaint, and the evidence set forth in complainant's affidavit (supporting his motion for continuance) would not be admissible upon the hearing of the cause." Thereupon, on motion of Morse, the cause was then dismissed, without prejudice to the parties. On April 20, the day succeeding the dismissal, he began a new suit against the same parties and sundry others, whom he joined with them as defendants.

The appellant severely censures the judge for overruling the motion for a continuance, and thereby forcing him to suffer his bill to be dismissed. It is not the province of this department to review the discretionary action of the judge. It will assume that he acted properly, until it is shown that he acted maliciously or corruptly.

I agree with you, that this second suit, begun long after the expiration of the thirty days, can not be considered by your office, nor allowed to retard the progress to patent of the claim of the applicants. The adoption of such a rule would put it in the power of every adverse claiment to postpone indefinitely the issue of the patent.

Your decision is affirmed, and the papers in the case transmitted with your letter of September 23, as herewith returned. Very respectfully,

C. DELANO, *Secretary.*

To the Commissioner of the General Land Office.

No. 9. Adverse claim under act of 1866.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 4, 1872.

Register and Receiver, Central City, Colorado Territory.

GENTLEMEN: The papers in the matter of Jacob Tascher's application for a patent for five hundred feet in length on

the Alger lode, with surface ground fifty feet in width, have been carefully examined.

It is shown that said application was filed in your office, on the seventeenth July, 1871, and notice thereof given, by publication and posting in the usual manner.

Before a survey of the claim was made or approved by the Surveyor-general, and on the sixteenth day of October, 1871, Joseph M. Marshall filed his sworn statement, to the effect that said application of Tascher embraces and is identical with claim No. 13 East, on the Kansas lode, owned by the Empire State, Texas and Lincoln Gold Mining Company, of Colorado, in whose behalf he files this sworn statement, "solely that justice may be done in the premises, and the said company protected in their title to said property."

This affiant is not shown to have any interest whatever in the premises, or any authority for appearing in behalf of said company, even if any such exists, a fact not established, however, by the papers.

It is not understood by what possible construction of the mining act, or the instructions thereunder, you received or filed this paper.

The sixth section of the mining act provides that, "whenever any *adverse claimants to any mine*, located and claimed as aforesaid, shall appear," etc.

Can not be filed by party having no interest.

Mr. Marshall having no interest whatever in the mine, "located and claimed as aforesaid," and no authority to represent parties having such interest, his affidavit entirely fails as an adverse claim upon which to suspend proceedings under the act, even if he had furnished the abstract of title or proof of possessory right of said company to the Kansas lode, as required by circular instructions. * *

On the twenty-fifth October, 1871, Theodore H. Becker, on behalf of himself and Anselm H. Barker, filed his affidavit and protest against said application for patent, on the ground of identity with the Dickerson lode, claimed by them, the said Becker and Barker, and for reason also, that the premises, as described in the notice and diagram, "are not the property of the said Jacob Tascher, and the said

applicant is not entitled to hold the same, under and by virtue of the local laws," etc.

Must file abstract of title.

These adverse claimants have failed to produce any abstract of title, and offer no evidence whatever in support of Mr. Becker's allegation of their joint ownership of the Dickerson lode.

The assertion that the applicant for patent is not entitled to hold the lode under the local laws, without specifying the grounds of such allegation, is a mode of testifying, which, if accepted, would enable deponent not only to determine the facts, but also the legal deductions therefrom, thus substituting his judgment for that of the department.

We can not accept as evidence the conclusions of law, stated in general terms; the specific facts set out in detail, upon which such conclusions are based, being required.

These opposing parties, Messrs. Becker and Barker, it is held, have entirely failed to make out an adverse claim, and their filing is accordingly rejected. * * *

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 10. ACT OF 1866.

Adverse claim, *for surface ground,* does not lie by subsequent location against the application for patent under the first location where separate and distinct lodes are claimed.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 1, 1872.

Register and Receiver, Austin, Nevada.

GENTLEMEN: On the thirteenth June, 1871, Ed. Powers, M. M. Egan, J. W. Kenneda, Ed. Curran, Thomas Kelly, and John H. Daly filed in your office an application for patent for one thousand linear feet of the Sierra Nevada lode south, situate in White Pine district, White Pine county, Nevada.

On the sixteenth of the same month they published their notice of intention to apply for a patent. From an abstract of title on file in the case, from the office of the county recorder, it appears that said lode was located on the twenty-fifth April, 1868, and record thereof made on the same day,

and that the applicants for patent have the record title to one thousand linear feet thereof.

On the sixth September, 1871, Michael Meagher, for himself and his co-tenants, filed an adverse claim to said application. In his sworn statement he alleges that said application for patent includes the Edgar mining claim; that said lodes or deposits are separate and distinct from each other; that he and his co-tenants, and their predecessors in interest, have been in the quiet, peaceable, and exclusive possession of said Edgar lode for more than two years last past, and that he and his co-tenants have performed the work necessary to hold a mining claim under the laws of White Pine mining district.

From an abstract of title on file in the case, from the office of the county recorder of White Pine county, it appears that the Edgar lode was located on the fourth of June, 1868, and record thereof made on the twentieth of June, 1868, and that Chas. E. De Long, M. Meagher, J. P. Garvey, and Annie Meagher have now the record title to one thousand two hundred linear feet thereof.

From the foregoing it will be perceived that the mining ground sought to be patented was located prior to said Edgar lode, and inasmuch as said deponent avers that the Edgar is a separate and distinct lode from the one for which said application for patent is made, it is held that said protestant has failed to present an adverse claim within the law, and for the following reasons, viz.:

Reasons for rule.

1. Every patent issued for mining property contains an express clause by which *all other* veins or lodes, except the one named in the grant, are excepted and excluded from the conveyance according to the terms of the mining statute.

2. Under the mining regulations of White Pine district, a locator is entitled to hold one hundred feet of surface ground on each side of his lead, lode, or ledge; but this surface right gives him no title or claim to any other distinct or parallel ledges which may be found to exist within such surface.

This opposing party having made no claim to the ledge

sought to be patented, but to another lode separate and distinct therefrom, and as priority of location determines the right to surface ground, it is ruled that this adverse filing does not constitute such an adverse claim, either to the lode or surface ground, as is contemplated by the sixth section of the mining statute, and the same is accordingly rejected.

* * * * * * * *

Very respectfully,

Your obedient servant,

W. W. CURTIS, *Acting Commissioner.*

No. 11. An adverse claimant is not required to establish to the satisfaction of the Land Department his compliance with law, further than properly asserting his adverse claim.

DEPARTMENT OF THE INTERIOR,

OFFICE OF THE SECRETARY,

WASHINGTON, July 14, 1877.

SIR: I am in receipt of your letter of the twenty-second ultimo, transmitting the papers in the matter of the application of Andrew Aitken and Israel Luce, for a patent for mining premises embraced in lot No. 40, township 8, range 13 east, M. D. M., Sacramento, California.

During the period of publication of the application, and under date of December 29, 1875, Lyman S. Bell and Richard Murray filed an adverse claim, and on the twenty-fourth day of January following commenced suit in the District Court of the Eleventh Judicial District for El Dorado county.

Under date of October 4, 1876, you decided the case, rejected the adverse claim of Bell and Murray, and stated that the applicants would be allowed to perfect their claims for patent for that portion not in conflict with the patented claim of C. E. McLane.

On the nineteenth of December following, Bell and Murray filed an appeal from your decision. You rejected the same, for the reason that it failed to set forth or state points of exception, and stated that your decision had become final.

In the Boston mining case, decided by my predecessor March 24, 1876, your office was instructed "that in future whenever an appeal shall be taken, which in your opinion

is unauthorized by law and the practice of this Department, to at once report the same to this office for decision." Such action should have been taken in the present case, and I do not think that by the delay the status of the case has been changed, but that it is properly before me for supervising control and decision.

Bell and Murray filed an adverse claim, and commenced suit within the time prescribed by statute.

You reject said claim for the reason that "they do not allege that they have the possession and the right of possession to the premises claimed by them in virtue of compliance with the local laws and congressional enactments, nor yet do they allege any compliance upon their part with said laws." Also that they fail to show the nature of their claim, "whether the same is a placer mine, a quartz claim, or a marble quarry."

Section 2326 of the Revised Statutes requires "that where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, extent of such adverse claim," etc.

In their sworn statement, filed with the local officers December 29, 1875, Bell and Murray assert that they are the owners, by purchase and location, and in possession of the adverse Marble Quarry mine, with surface ground; and they further state that the locators remained continuously in possession of said mine, working upon the same continuously until purchased by said L. S. Bell and Richard Murray, July 12, 1853, since which time it has remained in their possession, and that they have expended the sum of fifteen thousand dollars in working and developing the same, and that the record title to the same is in said claimants. In support of this last assertion certain deeds are filed, conveying an interest in certain mining lands. A copy of notice of location of certain ground for mining purposes, dated March 29, 1871, was also filed. Also a plat prepared by a United States deputy surveyor, showing the extent and boundaries of the tract claimed by Bell and Murray, and the portion in conflict with the claim of Aitken and Luce, was duly filed.

The adverse claim was filed upon oath, and shows the

nature of the claim to be by purchase and possession, also by location. The extent and boundaries of the claim are shown. In these respects the claimants appear to have complied with the requirements of the statute. Whether they have complied with the requirements of the law and have the better legal right to the land in controversy, is a question for the determination of the court, and should not be anticipated by this department.

Adverse claimant not required to establish compliance with law.

I see nothing in the statute that requires an adverse claimant, who seeks to protect his rights in the courts, which have been opened to him, to establish to the satisfaction of this department that he has complied with the requirements of the mining law, to a further extent than of properly asserting his adverse claim. The court is to judge whether he has thus protected himself. The statute makes it his duty "to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession." All questions connected with the claim must necessarily be considered by that tribunal.

In my opinion Bell and Murray have properly filed an adverse claim and commenced suit.

The papers transmitted by you are herewith returned, with instructions that all proceedings in the case be stayed until the determination of said suit.

Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 12. Any state of facts which shows that the person alleging the same has a better right to the premises applied for than the applicant, is the proper subject-matter of an adverse claim.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 28, 1875.

SIR: I have examined the case of the Mono Mining Company v. the Magnolia East and West Company, the Shoo Fly Company, and William A. Rooks, on appeal from your decision of November 27, 1874.

I affirm your decision on the grounds stated therein so far as it sustains the adverse claim of the Magnolia Company, adding, with reference to the objection urged against

it in the matter of proof of citizenship, that the law is complied with if citizenship be properly alleged, and the fact be not controverted. (Eureka Co. v. Jenny Lind Co., Sec. Dec'n, Copp. 169, 173, 177, 178; Kempton Case, Sec. Dec'n, Jan. 2, 1875.)

With reference to the adverse claim filed by the Shoo Fly Company, I am of the opinion that the stipulation filed in court in the suit commenced by the adverse claimants, signed by properly authorized counsel, and, so far as shown, without fraud, was a waiver of the adverse claim within the meaning of the seventh section of the act of 1872. I, therefore, reverse your decision, so far as it holds the Shoo Fly protest to be a valid subsisting adverse claim.

I do not agree with your ruling upon the protest in the nature of an adverse claim filed by William A. Rooks. This adverse claim was filed January 7, 1873. It alleged that the said Rooks was a citizen of the United States; that on or about the first day of September, 1871, he entered into a contract with H. D. Converse, T. R. Miller, Calvin Kirk, and E. McKendry, by the terms of which the said Rooks was to furnish said Converse et al. with such provisions, tools, and supplies as would enable them to subsist while prospecting for mines and making discoveries of lodes, veins, or deposits bearing precious metals, and that the said Converse et al. were, by the terms of said agreement, to prospect for mines, and make locations of such as might be discovered by them in their names, and in his name, as joint discoverers, and that each of said parties was to own, in his individual right, one undivided fifth interest of all such mines or lodes so discovered; that the said Rooks furnished the provisions, tools, and supplies when required so to do, and fully complied with his said agreement; that on or about the first of November, 1871, the said Converse et al. located and occupied, in accordance with the local laws, a certain lode, one thousand feet in length, to wit, five hundred feet each way from the place of discovery and location monument along the line of the lode, and named and designated the same the Giraffe; that they erected a monument on said lode, and placed thereon a written notice of location, describing the premises located and giving the names

of the locators, including the name of the said Rooks as one of the locators thereof, and claiming for each two hundred feet of said mine and location; that immediately thereafter the said locators commenced to work upon said mine, and that they remained continuously in possession for some time; that before the time had expired in which the local laws required that record of the location should be made the other joint owners of said mine, without the knowledge or consent of said Rooks and during his absence, entered into an agreement with three of the present applicants for patent for the Mono lode, to wit, Gibson, Embody, and Heaton, by which the said three last named parties agreed to do and perform all the work required by the local laws to hold said claim, and in consideration thereof they, the said three present applicants, were to have their names added to said location notice, each claiming two hundred feet additional, and to make record of said original notice as amended in the proper recorder's office; that the said three applicants entered into possession of said mine in accordance with the terms of said agreement, jointly with the other locators, and subsequently, without the knowledge or consent of the said Rooks, they took down the original notice of location from said monument and placed thereon another notice, containing the names of the locators of said mine, including the names of the said Embody, Gibson, and Heaton, but excluding therefrom the name of the said Rooks; that said last described notice named the said mine the "Mono," and was posted upon the identical monument previously erected, and upon which the Giraffe notice was posted; that said Giraffe notice was never recorded, but the said "Mono" was; that the said "Mono" location included the identical one thousand feet covered by the Giraffe location, and was the same lode as the Giraffe; that the Giraffe notice was concealed or destroyed, and that the said Embody, Gibson, and Heaton, at the time they made all the arrangements and agreements aforesaid, had full knowledge of all the rights of the said Rooks, and knew that he was the owner of one undivided fifth of said original location.

Rooks, on the eighth of August, 1872, commenced suit in

the proper court against the said applicants to "recover one sixth interest in the Mono mine," which suit is now pending and undetermined.

Upon these facts you held that whatever interest Rooks had in said mine, it did not amount to an adverse claim, because it did not originate by virtue of his compliance with the local laws and acts of Congress relating to mineral lands.

What constitutes an adverse claim.

I am of opinion that the interest of Rooks was an adverse interest, and was the proper subject-matter of an adverse claim. From his statement it is clear that his right to one undivided fifth of the Giraffe location is superior to any interest that the applicants have in the same. I suppose that if Rooks had purchased the entire interest of his co-locators in the one thousand feet and paid for it, and the present applicants had known of it before they pretended to acquire any interest in the same, his claim would be an adverse one, and would properly delay the issuance of a patent until the matter could be heard in court. In my judgment, any state of fact which shows that the person alleging the same has a better right to the premises sought to be patented, or any portion thereof, than the applicants for patent, is the proper subject-matter of an adverse claim, and when set forth in the manner required by the statute it amounts to an adverse claim, and should be treated accordingly.

I reverse your decision as to the said adverse claim of Rooks, and hold it to be sufficient.

I do not consider it necessary at this time to consider the objections raised relating to the application of the Mono Company, inasmuch as they will more properly arise upon the return of the case to your office after decision in the courts, to which it must go upon the adverse claims of the Magnolia Company and of Rooks.

The papers transmitted with your letter of January 25 last, are herewith returned.

Very respectfully,

C. DELANO, *Secretary.*

To the Commissioner of the General Land Office.

No. 13. 1. Such action as gave notice to local officers of an adverse claim, and clearly defined the nature and extent thereof, entitled to consideration:

2. Proceedings necessary where patent was wrongfully issued, before another patent can issue.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 14, 1878.

Register and Receiver, Carson City, Nev.

GENTLEMEN: I have carefully considered the application filed in this office December 16, 1875, by the Sierra Nevada Silver Mining Company, to have recalled and canceled the patent issued to the Union Consolidated Silver Mining Company, September 28, 1875, for claim upon the Comstock lode, in Nevada.

The facts, as appear from the records and files of this office, are as follows, viz.: That the premises described in said patent were located by the Union Gold and Silver Mining Company (of which the Union Consolidated Silver Mining Company is the legal successor), June 10, 1859, and record of said location was made July 4, 1859, according to the mining laws then in force. Application for patent by said company was filed in your office August 10, 1868. Notice was published in the Daily Territorial Enterprise, a newspaper published at Virginia City, Nev., on the twelfth of August, 1868, for the full period of ninety days thereafter, and notices and diagrams were duly posted upon the claim and in the Register's office for the period of time prescribed by the statute. On the twenty-seventh of May, 1874, the said Union Gold and Silver Mining Company conveyed by deed to the Union Consolidated Silver Mining Company the premises described in said application, which last named company completed the proofs required, and on the seventeenth of August, 1875, made entry of said claim. On the same day, the Register transmitted the papers to this office, and a patent was issued September 28, 1875 (as hereinbefore stated), to the said Union Consolidated Silver Mining Company for the premises, and said patent was duly transmitted to the local office, and delivered to the representative of said company.

There is a difference in description and area of the ground as described in the application and embraced in the patent;

but upon examination it is evident that there is no difference that would lead to any misunderstanding, so far as the ground in dispute is concerned. Therefore, this difference is not material.

By the application of the Sierra Nevada Silver Mining Company, now under consideration (made to this office, as stated, December 16, 1875), the following facts have been disclosed, viz.:

That the Sierra Nevada Silver Mining Company located and recorded under the mining laws June 22, 1859, giving a description which embraced the ground in dispute between the two companies, being the northerly two hundred and ninety-eight feet of the ground embraced in the patent which has been issued to the Union Consolidated Silver Mining Company.

August 10, 1868, the Sierra Nevada Silver Mining Company filed in your office an application for a patent for the premises located, the description embraced therein including the ground in dispute.

This was the same day that the application was filed by the Union Gold and Silver Mining Company, and the application of the Sierra Nevada Silver Mining Company bears a minor number to that of the other application, and although filed upon the same day, seems in point of time to be the prior application.

On the thirteenth of November the Union Gold and Silver Mining Company instituted an action of trespass in the court, and applied for an injunction against the Sierra Nevada Silver Mining Company, but this action was never prosecuted to a final issue.

The Sierra Nevada Silver Mining Company, under date of April 24, 1874, filed in your office an adverse claim and protest, and instituted suit against the Union Gold and Silver Mining Company May 22, 1874. This suit has not reached a final determination, but an injunction *pendente lite* was issued, restraining each of the defendants from taking any further steps toward the perfection of the application for patent. This injunction has never been dissolved, but remains in force.

The ground in dispute was actually occupied by the Sierra Nevada Silver Mining Company from 1866 to 1868, its hoist-

ing works having been erected thereon, and mining explorations of great extent having been carried on.

Some of the foregoing facts are evidenced by *ex parte* testimony only, but it is thought they will not be disputed, and if they are, the verity of any or all can be ascertained.

The counsel for applicant allege that "no protest or adverse claim has ever been filed against said application, nor have the necessary steps been taken to complete the application, for the reason, as alleged by the company, that this could not properly be done before the settlement of the controversy as to the two hundred and ninety-eight feet in the courts."

It is set forth in the adverse claim and protest filed April 24, 1874, above referred to, and also in the application under consideration, that the neglect to file a protest within the period of publication, and up to the date of the protest, was on account of a conspiracy between Robert Apple, then superintendent of the Sierra Nevada Silver Mining Company, and the officers of the applicant. This is denied by Apple and others.

The register has been superseded, and I shall not comment upon his action in withholding the papers adverse to the issue of patent, further than to remark that he was aware of the conflict between the claims, and while he states that service was not made upon him in the case of the suit brought by the Sierra Nevada Silver Mining Company, he does not say that he was not aware of the pendency, and under the circumstances it was unquestionably his duty to have transmitted all the papers, whether filed by the applicant or adverse claimant, that they might have been considered before the patent issued.

Adverse claims are referred to in the act of July 26, 1866, three times.

In section two claimant may file and receive patent "to whose possession there is no controversy or opposing claim;" in section three, where the survey is to be made, "if no adverse claim shall have been filed;" and in section six all proceedings shall be stayed whenever any "adverse claimants" shall appear before the approval of the survey.

This law contains no provision as to the form or manner of presenting or filing adverse claims.

The first general circular issued by this office to registers and receivers in regard to this act was dated January 14, 1867. In it the sixth section of the act is quoted without comment; the supplemental circular thereto of June 25, 1867, contains the following:

"Third. Should a party appear as an adverse claimant as contemplated by the sixth section of the act, you will require such person to show by proof the claim or interest he may have in the mine, and should the same be satisfactory to you, all further proceedings will be stayed, until a final settlement and adjudication shall be had in the courts. But in case the adverse claimant, after proceedings have been stayed, shall fail to institute action in the courts, either pending or at the next ensuing session, with a view to the final adjustment of the claims, you will proceed with the case as if no objections had been filed."

These are the instructions which had been issued when the applications were made by the respective parties in 1868.

What constitutes adverse claim.

For reasons which are obvious, the same technical observance in pleading has not been required before the local land offices as is customary in courts, where rules are prescribed in accordance with law or custom, and the attorneys are held to a compliance therewith, and with the requirements of legal authorities upon the subject, by judges learned in the law, and where there is evident good faith manifested the ruling of this office should be liberal, and it should be the aim to give all parties interested an opportunity to assert their rights, and not deprive any one of this privilege by a purely technical ruling. Such action, therefore, as gave notice to the local officers of a conflict in claims, and clearly defined such claims, would seem to me to be a sufficient compliance with the act of 1866 to entitle the party asserting the claim to a consideration as an adverse claimant under said act. The description of the premises claimed was distinctly set forth in both applications and accompanying diagrams. I am of opinion, therefore, that each of the parties had taken such steps, in 1868, and prior thereto, as should be regarded as an adverse filing in relation to the application of the other.

That the register had sufficient knowledge of the claim of the Sierra Nevada Silver Mining Company to put him upon full inquiry when he permitted the entry by the Union Consolidated Silver Mining Company, August 17, 1875, is evident from the fact that upon the diagrams accompanying that entry the northerly two hundred and ninety-eight feet of the premises patented has marked upon it, "Sierra Nevada and Union disputed ground," and in letter of fourth of February, 1876, in forwarding the protest and adverse claim of the Sierra Nevada Silver Mining Company, filed April 24, 1874 (in compliance with directions from this office), he acknowledges that he was aware of its existence, but did not regard it as having been filed in time.

In regard to this protest, if it had been filed within ninety days after the application of the Union Gold and Silver Mining Company, it would constitute as full a compliance with the law and all instructions as to adverse filings as could practically be made. Prior to the decision of the Secretary of the Interior of March 14, 1872, in the case of the "Flag-staff lode," in Utah, it had been uniformly held that adverse filing could be made at any time prior to the approval of the survey. The secretary gives the following reasons in support of his decision in the "Flag-staff" case, that "an adverse claim might be filed, which of itself would suspend the approval of the survey until it was adjudicated. Another claim might be filed before that was disposed of, or the survey approved, and thus adverse claims might lap over each other, until it would be almost an impossibility for a claimant to be in a condition where he could demand an approval of the survey and the issuing of his patent."

This reasoning does not apply to the action of the Sierra Nevada Silver Mining Company. This company, as alleged by counsel, did not complete its application because it was awaiting the result of the suit instituted by the Union Gold and Silver Mining Company, to decide the title to the ground in dispute, and had, during this time, the ruling of the department down to March 14, 1872, giving assurance that if all proper steps had not been taken, an "adverse filing" could be made at any time before the approval of the survey. The filing by the Sierra Nevada Silver Min-

ing Company of April 24, 1874, may come within the letter, but certainly not within the spirit, of the decision in the "Flag-staff" case.

This filing was made and the suit instituted apparently as an earnest effort on the part of the company to assert their claim, it appearing that the suit on the part of the Union Gold and Silver Mining Company was not being prosecuted to a final determination.

In view, therefore, of all these facts, which are *now* before this office, I am satisfied that all proceedings should have been stayed until final settlement and adjudication in the court of the rights of possession to the disputed ground, and not until then should the patent have been issued.

If the patent were in the possession of this office, I should direct its cancellation, but having been delivered, it can not now be canceled or annulled by the department. (13 Opinions Attorneys-general, 456; 13 Peters, 436; 2 Wallace, 525.)

The honorable Secretary of the Interior, in his decision of the twelfth of July, 1876, in the case of John W. Harbinson et al., speaking of the issue of a second patent, says:

Proceedings to set aside patent.

"I am of opinion that no such patent should be issued, except when expressly provided for by law, or in exceptional cases, when the party entitled thereto would be practically remediless without it. If it satisfactorily appears that a patent has been issued through inadvertence, or by the misconstruction of the law, by any of the officers of the government, its return should be promptly demanded, and if the demand is refused, proceedings should be immediately instituted to procure its cancellation.

"The courts afford ample facilities for such proceedings, and are the proper and only tribunals for the final determination of such questions. I therefore direct that in this case, and in all cases where you become satisfied that patents have been erroneously issued, you request the patentee to return the same, and if he refuses or neglects so to do after reasonable notice, you will report such refusal or neglect to me, that the department of justice may be re-

quested to institute proceedings to have said patents canceled."

You will request the proper representative of the patentee to surrender the patent to you that it may be returned to this office for cancellation. If this request is refused, I shall recommend that the Sierra Nevada Company be authorized to institute proceedings in the proper United States court, in the name of the United States, to test the validity of the patent issued to the Union Consolidated Silver Mining Company.

Make the request for surrender of patent without delay, and as soon as a reply is received, or at the end of thirty days from receipt hereof, report your action to this office.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 14. Adverse claim can not be amended to include a larger tract than described in original.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 14, 1873.

A. J. RIDGE, Esq., *Grass Valley, California.*

SIR: * * * Adverse claims filed after the expiration of the time prescribed by the statute can not be considered.

When an adverse claim has been filed, the same can not be amended so as to embrace a larger portion of the premises applied for than that described in the original adverse claim. Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner.*

No. 15. 1. Proof of continuous posting of notice of application upon the claim.

2. Adverse claim filed, upon stipulation between parties, twenty days after expiration of publication of notice.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Sept. 19, 1879.

Register and Receiver, Leadville, Colorado:

GENTLEMEN: In the matter of the application for patent to one thousand five hundred linear feet upon the Lincoln lode, made in your office, July 31, 1875, by the Lincoln Silver Mining Company, of Colorado, which application

was suspended by you for reasons hereinafter stated, the facts appear to be as follows:

Proof of continuous posting must be made by persons acting under authority of company.

The applicant claims as owner by purchase. Publication was made from August 7, 1875, to October 9, 1875, the full period of ten weeks, during which time posting on claim and in land office was performed, and complete proof thereof filed with the exception of affidavit of continuous posting, which was made by Charles S. and Joseph B. Case, with this explanation: "It is impossible to obtain the affidavit of the agent of the company that the plat and notice remained posted on claim sixty days, and in lieu thereof the within is submitted." To make this proof complete, it should be shown that said affiants acted under authority of the company as its agents for this purpose, at the time of making said proof: otherwise the affidavit of the duly authorized agent of the company will be necessary.

No adverse claim was filed during the period of publication, but a stipulation—setting forth that J. H. Morrison, James McNassor, and the heirs of Sylvester Ferguson, deceased, claimed to own a portion of the land applied for by the Lincoln Silver Mining Company; that it was believed by the parties thereto that the differences existing might be harmoniously settled and suit avoided; that if it should prove that no amicable settlement could be arrived at, then the said Morrison et al. should be at liberty, at any time within twenty days after the period of publication should have expired, to file with the register and receiver an adverse claim with the same effect as if filed during the period of publication, and proceedings under the application for patent should be suspended by the register and receiver until the matter could be adjudicated by the courts—was signed by the attorneys of the respective parties, and filed in the case.

Within the period of twenty days after the expiration of the period of publication, to wit, on the twenty-second of October, 1875, the last day of publication being the ninth day of said month, an adverse claim was filed with the register and receiver, as provided for in the above recited

stipulation; and thereupon proceedings were suspended under the application, and suit was commenced twentieth November, 1875.

By certified copy of court minutes, it appears that this cause was, upon motion of plaintiff's attorney, continued from term to term, and on the twenty-fourth of December, 1878, more than three years after commencement of action, was still pending; and it does not appear that during all this length of time any motion was made by plaintiffs for a rule on defendants to plead, or that issue was joined.

Claimants ask that said adverse claim be dismissed, for the reasons, among others:

1. That the said adverse claim was not filed during the period of publication, but was filed after such period of publication had expired.

2. That said adverse claim has been waived by negligence of Morrison et al., in prosecuting the suit.

Section 2325 U. S. Revised Statutes prescribes that "if no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter *no objection from third parties to the issuance of a patent* shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

The succeeding section prescribes the manner in which an adverse claim shall be filed and proceedings stayed.

Where the statute is mandatory, and prescribes one way in which a thing shall be done, it can not be done in any other way. The statutory provision being that an adverse claim must be filed with the period of publication, and declaring that if not filed within such period "no objection from third parties to the issuance of a patent shall be heard except it be shown that applicant has failed to comply with the terms of this chapter," it is mandatory upon the register and receiver, and upon this office, after the expiration of such period of publication, to recognize no adverse claim and hear no objection whatever to the issuance of a patent, except to show that the applicant has not complied with the terms of said chapter.

Applicants for patent can not extend or abridge period of publication.

It is not within the power of applicants for patent to extend or abridge the period of publication. If they can by stipulation change this provision of law, I know of no reason why they might not avoid any other in the same way; and to admit that a specific mandatory provision of statute can be avoided by agreement of the parties affected by it, would be absurd, and work endless confusion.

Consent can not give jurisdiction, where no authority of law is given over the subject-matter to be adjudicated. As Morrison et al. failed to comply with the law, by neglecting to file their adverse claim within the time prescribed by law, which they were bound to know and understand, they can not now, even by agreement with their opponents, clothe the register and receiver with a power not granted by the statute.

Had the adverse claim been properly filed within the period of publication, the question as to whether "reasonable diligence" had been used in the prosecution of the suit filed in pursuance thereof within thirty days from said filing of the adverse claim, would have been a matter for the court to determine and not this office (see decision of the Hon. Secretary of the Interior, Iowa Mining Co. v. The Bonanza Mining Co., June 25, 1879).

For the reasons stated, the said adverse claim of Morris et al. is dismissed, and applicant is at liberty to complete his proof, pay for the land, and make entry.

Notify all the parties concerned hereof. The adverse claimants not having filed their adverse claims within the period of publication, must be regarded as protestants only and are entitled to no appeal. Respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 16. Suit brought against applicant for patent on lode claim thirteen months after publication of notice of application.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 22, 1877.

Register and Receiver, Sacramento, Cal.

GENTLEMEN: On the twenty-fourth February, 1874, L. W. Wood and G. W. Haskell filed in your office an application

for patent for the Woodville Placer claim, designated by the Surveyor-general as Lot No. 43, T. 16 N., R. 9 E. Mt. Do. Mer.

The notice was published in the Daily Transcript, a newspaper published at Nevada City, California, from the 28th February to the 30th April, 1874. The notices and plats were duly posted upon the claim and in the Register's office.

The applicants claim under a location made by them on the 26th December, 1873, and a relocation made on the 7th February, 1874.

On the nineteenth March, 1874, Michael Garver filed an adverse claim against said application for patent, and commenced suit thereon, which suit was dismissed March 23, 1875.

No other adverse claim was filed with you against such application for patent.

It appears by the judgment roll of the District Court of the Fourteenth Judicial District of California in case of C. H. Seymour v. L. W. Wood et al., which has been filed in this office by the attorneys for C. H. Seymour, that on the twenty-fifth March, 1875, Seymour commenced proceedings in said court against Wood et al., alleging ownership of an undivided eight twentieths of the Nebraska Placer claim, and that the identical premises sought to be patented as the Woodville Placer claim were formerly known as the Nebraska claim. On the twenty-seventh October, 1875, judgment was rendered in favor of Seymour for eight twentieths of the Nebraska claim.

A motion for a new trial in the case having been denied by said court, an appeal was taken to the Supreme Court of the State of California.

The transcript on appeal in this case was filed in the office of the clerk of said Supreme Court on the sixth October, 1876.

Section 2325 of the Revised Statutes of the United States declares the manner in which patents may be secured to mining claims, and provides that "if no adverse claims shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, * * and that no adverse claim exists,

and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 Revised Statutes declares the manner of procedure where adverse claims are filed within the period of publication of notice and suit commenced thereon.

In the case under consideration, no adverse claim was asserted by C. H. Seymour within the period of publication, and no suit was commenced by him against said applicants, bringing into question the right of possession to any portion of the premises for which patent is sought until thirteen months had elapsed from the date of the first publication of notice.

Judgment upon such suit not recognized by land office.

The fact that Seymour commenced proceedings against the applicants for patent at that late day, and secured judgment against them for a portion of the premises, can not be taken cognizance of by this office.

The law clearly points out the time within which an adverse claim must be filed, and the time within which suit must be commenced thereon, and this office has not the power, if it had the disposition, to disregard these plain and positive requirements.

Where parties fail to file their adverse claims within the time and in the manner provided by law, they can not subsequently be permitted to assert an adverse claim before this office.

Seek remedy in a court of equity.

If Mr. Seymour has a right to any portion of said premises which this office can not take cognizance of by reason of his having failed to assert the same as provided by the statute, his remedy will be in a court of equity, to have the patentees declared trustees and compelled to convey the legal title. Stark v. Starrs, 6 Wall. 402; Johnson v. Towsley, 13 Id. 72.

This case will be taken up for final action as though no objections had been presented by Mr. Seymour.

You will inform all parties in interest, and acknowledge the receipt hereof. Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 17. 1. An adverse claim filed one day, and on the following day withdrawn and refiled, will be considered, within the meaning of the law, to have been filed on the latter day.

2. The oath of the editor and proprietor of a newspaper that the notice was published for sixty days, and in which he states the dates of the first and last insertion (if no error is apparent upon its face) considered sufficient proof of publication.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE;
WASHINGTON, D. C., March 10, 1877.

Register and Receiver, Elko, Nevada.

GENTLEMEN: On the sixth of September, 1876, John F. Lewis filed in your office an application for patent, for fifteen hundred linear feet of the Juniper mine, Sprucemont mining district, Elko county, Nevada.

The notice and diagram were posted upon the claim from the twenty-eighth of August, 1876, to the twelfth of November, 1876, and in the Register's office from the sixth of September, 1876, to the twenty-second of January, 1877.

By the sworn statement of the editor and proprietor of the Elko Weekly Post, it is shown that the notice was published in said newspaper for the period of sixty days, the first publication being on the ninth of September, 1876, and the last on the eleventh of November, 1876.

On the sixth of November, 1876, the applicant for patent filed in your office a relinquishment to the westerly three hundred and nineteen feet of the claim as applied for, and withdrew his application for patent to the portion relinquished.

Protest withdrawn and refiled.

Against this application for patent, a protest and adverse claim was filed by the Sprucemont Mining Company, which bears the following indorsement, viz.:

"Filed in the Elko Land Office this eighth day of November, A. D. 1876.

"W. M. STAFFORD, *Receiver*."

"Withdrawn and refiled in the Elko Land Office this ninth day of November, A. D. 1876.

"W. M. STAFFORD, *Receiver*."

This filing can not be considered as having been made

until the ninth day of November, 1876. It is evident that the protestant did not regard this protest as *filed* until the ninth of November, for after leaving the papers with the receiver on the eighth of the month, the same were withdrawn and placed on file the following day in the local office, where they remained until transmitted to this office by the local officers. It is alleged by the applicant for patent and his attorney, in their sworn statements, that one or more of the papers filed by the protestant were not signed when left with the Receiver on the eighth of November.

It is, however, unnecessary to inquire whether they were signed on the eighth of November or not, as the protest was not *filed* until the ninth day of the same month.

Said filing having been made after the expiration of the sixty days notice by publication can not be considered as an adverse claim.

Section 2325 of the Revised Statutes of the United States, provides that if no adverse claim has been filed against an application for patent at the expiration of the sixty days notice by publication, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists, and "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

This filing can be considered as a protest only, and said protestants are to be considered as parties to the contest for the purpose of *showing from the record* that the claimant has not complied with the requirements of the act. *Vide* decision of the Hon. Secretary of the Interior, dated April 30, 1874, in case of John H. McMurdy et al. v. E. S. Streeter et al.

It is urged by the attorney for the protestant that the proof of publication of notice is insufficient.

By the sworn statement of the editor and proprietor of the Elko Weekly Post, it is shown that the notice was "published in said newspaper for sixty (60) days, the first publication being on the ninth day of September, 1876, and the last publication on the eleventh day of November, 1876."

Section 2325, Revised Statutes, requires the Register to publish the notice "for the period of sixty days."

Sufficient proof of publication of notice.

The editor and proprietor of said newspaper alleges under oath that the notice was published for the period of *sixty days*, and that this fact may be definitely established, he gives in his sworn statement the date of the first and last insertions of such notice, the last insertion being more than sixty days after the first insertion.

The proof of publication of notice in this case is sufficient, and the objection urged is overruled.

It is also urged that the plat and field notes are copies and not the originals.

Question raised as to plats being copies and not originals.

Section 2325, Revised Statutes, provides that an applicant for patent may file in the proper land-office an application for patent, "together with a plat and field notes of the claim * * made by or under the direction of the United States Surveyor-general, showing accurately the boundaries of the claim."

In all cases of applications for patents for mining claims the Surveyor-general prepares four plats of the survey of the claim and also prepares the field notes of such survey in duplicate.

The duplicate field notes and the four plats when found correct are approved by the Surveyor-general.

In the case under consideration one of the plats and a transcript of the field notes of the survey of the claim certified to as correct and duly signed by the Surveyor-general of Nevada, in the usual form, and in accordance with the instructions from this office, were filed with the local officers of the same day that said application for patent was filed.

This objection is accordingly overruled. It is urged that the claimant failed to comply with the law by neglecting to file a certificate of the Surveyor-general that five hundred dollars had been expended upon the claim with the Register, within the sixty days of publication.

The approved plat of the premises for which patent is sought, is referred to as "Survey No. 41, Plat of the John

F. Lewis claim on the Juniper lode, Sprucemont Mining District, Elko county, Nevada." The field notes are equally explicit in referring to the said premises.

As before stated, both the plat and the field notes were filed with the application for patent, and upon each is a certificate of the Surveyor-general of Nevada, "that the value of the labor and improvements upon the said mining claim is not less than five hundred dollars."

This objection is overruled.

It is urged that no patent can issue upon said application, as "there is no proof that at the time the Juniper claim was located, any ledge had been discovered within the limits of the location claimed."

In the original location notice reference is made to the fact that the locator claimed by virtue of such location "one claim of fifteen hundred (1,500) feet on this ledge, lode, or deposit of mineral-bearing rock," etc.

This claim was recorded in the district recorder's office, and it is to be presumed, in the absence of any proof or allegation to the contrary, that the locator had complied with the law in the matter of his location before the recorder made record thereof. In the sworn statement of the applicant he alleges that he and his grantors "have observed and conformed to the rules, laws, and regulations governing this district."

This objection is overruled.

Several other objections have been urged, but after a careful consideration of the same, and examination of the papers in the case, no objection is found which can defeat the application for patent.

You will upon the receipt hereof allow J. F. Lewis to make entry of the premises applied for, with the exception of that portion abandoned on the sixth of November, 1876.

It will be necessary for the applicant to cause the Surveyor-general to forward amended plat and field notes, describing only that portion of the claim which he has not abandoned.

You will inform all parties in interest and acknowledge the receipt hereof.

Very respectfully, your obd't servant,

J. A. WILLIAMSON, *Commissioner.*

No. 18. Adverse claim by incorporated company.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 26, 1874.

Register and Receiver, Central City, Colorado.

GENTLEMEN: I have examined the papers in the case of the application of the Marshall Silver Mining Company, of Georgetown, for patent for fifteen hundred linear feet of the Reynolds lode, Colorado.

The applicant filed proof of compliance with the law.

Within the sixty days notice of publication, John Turck, as agent and attorney for the Equator Mining and Smelting Company, filed an adverse claim against said application for patent.

In his sworn statement he alleges that the premises described in the application for patent embraces and covers the identical ground and vein now owned, held, and possessed by these adverse claimants, to wit: the Equator lode. That said adverse claimant and its grantors have held and worked the Equator lode since the year 1867, and that said adverse claimant has expended on said Equator lode more than sixty thousand dollars.

Accompanying the adverse claim is a plat showing the relative situation of the two claims and the extent of the conflict.

This plat or diagram is certified to by Albert Johnson, deputy surveyor.

By the abstract of title it appears that the said Equator Mining and Smelting Company has record title to the said Equator lode.

By the certificate of the clerk of the court it appears that said adverse claimant commenced suit against said applicant, within the time prescribed by the statute, "to recover possession of * * * fourteen hundred feet in length by fifty feet in width on the Equator lode."

The attorney for the applicant, on the twenty-first of April, 1874, filed with you a request to disregard the adverse claim, as the same had been sworn to by John Turck, as agent and attorney for said Equator mining and smelting company.

In support of his request he cites the decision of the Honorable Secretary of the Interior in the case of the Jenny Lind Mining Company et al. v. the Eureka Mining Company. All of the adverse claimants to the application of the Eureka Mining Company for patent were unincorporated companies or associations.

The Honorable Secretary of the Interior, in his said decision of the twenty-fourth of November, 1873, concurred in the opinion of the Hon. W. H. Smith, Assistant Attorney-general, dated November 22, 1873.

The Honorable Assistant Attorney-general, in his opinion, recites the fact that said adverse claimants were unincorporated companies, and states that "the seventh section of the act of May 10, 1872, provides that where an adverse claim shall be filed during the period of publication, it shall be upon the oath of the person or persons making the same. It does not provide that it may be made upon the oath of an agent or attorney. Without statutory authority an attorney can not make the oath for his client. I find myself obliged to advise that the above-named adverse claims were not properly verified."

In the case under consideration the adverse claimant is an incorporated company.

Incorporated company act through agent.

An incorporated company must necessarily act through its officers or agents. The company, as a company, can not make oath to the statements contained in an adverse claim presented by it.

Not covered by decision in "Jenny Lind" case.

This adverse claim having been filed in due time and in proper form, the proceedings upon said application will be staid until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived, as provided in the seventh section of the mining act of May 10, 1872.

You will inform all parties in interest, and acknowledge the receipt hereof.

Very respectfully,

Your obedient servant,

W. W. CURTIS, *Acting Commissioner.*

No. 19. Eureka Mining Company v. Jenny Lind Mining Company.

1. Who must file the adverse claim.
2. How to count sixty days for publication of notice.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 26, 1873.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: On the twenty-first of August, 1872, the Eureka Mining Company of Utah filed in your office applications for patents for the Eureka and Montana lodes, situate in Tintic mining district, Juab County, Utah.

In each of these cases the applicants have filed proof of compliance with the mining law, and the instructions from this office.

The following adverse claims were filed against the application for patent for the Montana lode, viz.:

1. Peter Roberts et al. filed an adverse claim on the fourth of October, 1872, and withdrew the same on the twenty-third of November, 1872.

2. E. M. Peck et al. caused to be handed to the register, at his house, on the twenty-second of October at 11:30 P.M., an adverse claim to said application for patent, which was, by the register placed on file in his office, on the morning of October 23, 1872.

This adverse claim is accompanied by a plat and field notes of survey of the Excelsior lode, claimed by Peck et al. The attorney for said adverse claimants, however, alleges, under oath, that said plat and field notes do not properly locate or describe the premises owned by said adverse claimants.

The sixth section of the mining act of May 10, 1872, declares that "if no adverse claim shall have been filed with the register and the receiver of the proper land office, at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard," etc.

In each of the cases referred to, viz., the Eureka and Montana lodes, the notice of intention to apply for a patent was

first published in the Weekly Tribune, bearing date Saturday, August 24, 1872, although, in fact, the paper was issued and put in circulation on Friday, August 23, 1872, and by the affidavits of the bookkeeper and agent of the Tribune Publishing Association, it appears that the Weekly Tribune "is printed, published, and issued from the office on Friday of each week."

This office is of the opinion that in computing the time for the sixty days publication required by law, the date of the paper, as given thereon, should govern.

Under the rule adopted by my predecessor, and which has been followed in all cases of this class decided since the act of July 26, 1866, went into effect, the day of publication of notice has been included in the computation of time.

Although I have some doubt as to the correctness of this rule, I do not feel disposed to depart from it, unless it should be reversed by the head of the department, and therefore decide that the adverse claim asserted by said E. M. Peck et al., was not filed within the sixty days publication required by law, and the same is accordingly rejected.

In case of the application for patent for the Eureka lode, the following adverse claims were filed, viz.:

1. Peter Roberts et al. filed an adverse claim to said application for patent on the twenty-second of October, 1872, and withdrew the same on the twenty-third of November, 1872.

2. O. D. Strong et al. caused to be handed to the register at his house, on the twenty-second of October, 1872, at 11:30 P. M., an adverse claim to said application for patent, which by the register was placed on file in his office on the morning of October 23, 1872.

This adverse claim is not made out in the manner prescribed by law, and by the instructions from this office. No plat or field notes of survey of the May Henrietta lode is on file, showing the "nature, extent, and boundaries" of the premises claimed by Strong et al. No abstract of title has been filed to show the record title to the May Henrietta lode to be in the adverse claimants.

This adverse claim was not filed within the sixty days publication required by law, and is therefore rejected.

3. The adverse claim of Aspinwall and Page was filed in the same manner and at the same time as the last named adverse claim.

This adverse claim is also irregular. No plot or field notes of survey of the King David lode has been filed, showing the "nature, extent, and boundaries" of the premises claimed by said Aspinwall and Page.

No abstract of title has been filed, showing the record title to said King David lode to be in said adverse claimants.

This adverse claim was not filed within the period of time prescribed by law, and is accordingly rejected.

4. The Jenny Lind Mining Company caused to be handed to the Register at his house, on the twenty-second October, 1872, at 11:10 P. M., an adverse claim to said application for patent, which, by the register, was placed on file in his office on the morning of the twenty-third October, 1872.

This adverse claim is in the main made out in the form prescribed by law; and, by the instructions from this office, although no abstract of title is on file from the office of the proper recorder, tracing the title from the original locators to the Jenny Lind Mining Company.

This adverse claim was not filed within the time prescribed by law, and can not operate as a bar to the issuance of a patent as applied for, and the same is rejected.

The only adverse claims filed within the time required by law are those of Peter Roberts et al., and both of these have been withdrawn.

You will inform all parties in interest that the adverse claim of E. M. Peck et al. to the application for patent for the Montana lode is rejected. Also, the adverse claims of O. D. Strong et al., Aspinwall and Page, and the Jenny Lind Mining Company, to the application for patent for the Eureka lode, and that sixty days from the date of your notification to them will be allowed within which an appeal may be taken to the Hon. Secretary of the Interior.

Should no appeal be taken within the time prescribed, you will allow the applications for patents for said Eureka and Montana lodes to proceed.

Should an appeal be taken, you will not allow the entries

until the cases have been finally determined by the appellate authority.

Be pleased to acknowledge the receipt.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., November 24, 1873.

SIR: I have carefully examined the case of the Eureka Mining Company v. The Jenny Lind Mining Company et al., on appeal from your decision of the twenty-sixth day of March, 1873. I caused the same to be referred to Assistant Attorney-general Smith for an expression of his views upon the questions involved, and have received from him two opinions, one of which is dated September 30, ult., and the other the twenty-second inst., copies of which you will find inclosed.

I concur with him in the conclusions to which he has arrived, and, in accordance therewith, hold:

Questions decided.

First. That in estimating the sixty days of publication required by the act of May 10, 1872, the first day of publication should be excluded and the last included.

Second. That the jurat to the adverse claim, required by the seventh section of said act, must be made by the party, and can not be made by an attorney.

Third. That where several persons unite in an adverse claim, the jurat is sufficient if made by one of such persons.

Fourth. That the filing of an adverse claim with the Register is a sufficient filing under the said act; and

Fifth. That the adverse claim of the Jenny Lind Mining Company does sufficiently set forth the "nature" of said claim.

I affirm so much of your decision as rejects the adverse claims of the May Henrietta lode, the Excelsior lode, and the King David lode; and reverse so much as rejects the adverse claim of the Jenny Lind Mining Company.

I return herewith the papers transmitted with your letter of the second June last.

Very respectfully,

C. DELANO, *Secretary.*

Hon. W. DRUMMOND, *Com'r General Land Office.*

[Inclosure No. 1.]

DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY-GENERAL,
WASHINGTON, D. C., September 30, 1873.

SIR: I have considered the appeal of the Jenny Lind Mining Company and others, adverse claimants, in the matter of the application of the Eureka Mining Company, for a patent for the Eureka and Montana lodes, situated in Tintic mining district, Juab county, Utah. The Eureka company filed their application on the twenty-first of August, 1872, under the act of May 10, 1872, and on the twenty-fourth of August, 1872, the Register gave notice of such application by publication in the Weekly Tribune of that date, which was continued for sixty days.

The Jenny Lind company, and the other adverse claimants, now contesting, filed their adverse claims with the Register of the proper land office. These filings severally bear date October 22, 1872, at 11:30 o'clock P. M.

It is contended by the Eureka company, that as a matter of fact, said adverse claims were left with the Register on the twenty-second of October, 1872, at 11:30 P. M., at his house, which was distant about a quarter of a mile from the land office, and were not filed in the office of the Register until the twenty-third of October, 1872, and that such filings in the office on the twenty-third were too late, the sixty days of publication having expired on the twenty-second. It is also contended by the Eureka company, that the adverse claims of some of them were not prepared with the necessary formality, and did not contain proper plats of survey or abstracts of title, and were otherwise defective.

The Commissioner of the General Land Office held that the adverse claims were filed one day too late, and therefore he rejected them.

I shall first consider the question whether the filing was too late upon the assumption that it was not made until the twenty-third October, 1872.

The sixth section of the act of May 10, 1872 (17 Stats. 93), provides that an applicant for a patent for mineral lands shall file in the proper land office an application under oath, with a plat, etc., and that "the Register of the land office, upon the filing of such application, plat, field notes,

notices, and affidavits, shall publish a notice that such application has been made, *for the period of sixty days*, in a newspaper to be by him designated as published nearest to said claim, and he shall also post such notice in his office for the same period."

The seventh section provides: "That where an adverse claim shall have been filed *during the period of publication*, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived."

From the foregoing express provisions of law it appears that the time of publication is "for the period of sixty days," and that the adverse claim must be filed "during the period of publication," that is, during "the period of sixty days." When does this "period of sixty days" commence, and when terminate? Does it include or exclude the first day of publication? If it includes it, then, upon the assumption that the adverse claims were not filed until the twenty-third October, they were filed one day too late. On the other hand, if it excludes it, then the filings were in time.

First day of publication excluded—Authorities cited.

The inquiry presented is one which has been a vexed question for centuries, and has been decided differently by the ablest courts in this country and in England. It has been appropriately termed the *controversia controversissima* (Griffith v. Bogert, 18 How. 162). I shall not attempt to review the cases, for the reason that my official duties are such as not to allow the necessary time. I have carefully examined them, and from such examination am of opinion that the first day of publication should be excluded. When a computation of time is to commence from an act done, the day on which the act is done is to be excluded. In support of this view I cite the following authorities: 4 Kent, 103 (note), 11 ed.; 2 Parsons' Cont. 663 (note); Pope v. Headen, 5 Ala. 433; Lyon v. Hunt, 11 Id. 295; Lang v.

Phillips, 27 Id. 311; Kim v. Osgood, 19 Miss. 60; 25 Id. 48; Bigelow v. Wilson, 1 Pick. 485; State v. Schwerle, 5 Id. 279; Wiggins v. Peters, 1 Met. 127; Farwell v. Rogers, 4 Cush. 460; Weeks v. Hull, 19 Conn. 376; Carleton v. Bying, 16 Iowa, 588; Caruthers v. Wheeler, 1 Oregon, 194; Judd v. Fulton, 10 Bart. 117; Russell v. Russell, 11 Id. 96; Cornell v. Moulton, 3 Denio, 12; Barr v. Lewis, 6 Texas, 76; State v. Gascon, 33 Miss. 102; Cann v. Warner, 1 Houston (Del.) 88; Gorham v. Wing, 10 Mich. 486; Sheets v. Selden, 2 Wall. 177; Page v. Weymouth, 47 Maine, 238; Walsh v. Boyle, 30 Md. 262; Thorne v. Mosher, New Jersey Eq. 257; Rex v. Cumberland, 4 How. & M. 378; Gout v. Edwards, 11 Sim. 434; Wilkinson v. Gaston, 9 Queen's Bench, 141.

The cases also establish the proposition that when there is a doubt as to whether the day in which an act is done should be included or excluded, that construction should be adopted which will support a contract, or deed, rather than that which would destroy it; that which will prevent a forfeiture rather than that which would create one. And in cases of statutory enactment that which will be most favorable to the party for whose benefit the statute was enacted.

In the case under consideration the provision that there should be a publication of sixty days was made for the benefit of adverse claimants, and for the purpose of giving them an opportunity to assert their adverse claims, and in case of doubt as to whether the first day of publication should be included, or excluded, that doubt should, in my opinion, be decided in favor of the adverse claimants. I have proceeded thus far upon the assumption that the adverse claims in the case now under consideration were not filed until the twenty-third October, and upon such assumption I think they were filed in time.

There is another view that may be taken of this case, which leads to the same conclusion. These adverse claims all bear an official indorsement that they were filed on the twenty-second of October, 1872, at 11:30 P. M. Such indorsement is *prima facie* evidence that they were filed *in the proper office at that date*, and this legal presumption, if removed at all, must be removed by competent evidence.

The only proof that has been offered to rebut this presumption, and show that there was no filing in the land office until the twenty-third of October, is an unsworn certificate of the Register, made in Washington city, on the first of March, 1873, in which he states that the adverse claims were left at his house at 11:30 P.M., October 22, and on the next day taken to the land office, and marked filed as of the twenty-second, 11:30 P.M.

I am of opinion that this is incompetent evidence, that the official act of a sworn officer can not be contradicted or explained by an unsworn statement like this, made long after the *res gestæ*.

I think the adverse claims were filed in time, and that the Commissioner erred in rejecting them on the ground that they were not so filed.

The Commissioner mentions the fact that some of the adverse claims were irregular, in not being accompanied with a plat of survey and field notes. It is pretty satisfactorily shown in the evidence that the protestants made use of reasonable means to procure such survey and field notes, and that they were prevented from so doing by the act of the Eureka Company, in obtaining control of the United States deputy surveyors, and thereby preventing them from making the survey for adverse claimants.

Failure to file plat of survey of adverse claim excused when obstructed by applicant.

To allow that company to exclude the adverse claims for that reason, would be to permit it to take advantage of its own wrongful act. The regulations issued by the Commissioner, it is true, require that there shall be such a plat and field notes, but they do not have the force of law, and were never intended to operate as a bar, where an applicant in good faith has done all that was in his power to comply with them.

And so with reference to the abstract of title. It is convenient to have such abstract for the purpose of showing how the claimants derive title, and therefore the adoption of the rule by the Commissioner.

If the adverse claimants properly *allege* that they are the *owners* of the claim, that is good pleading, and sufficient to

notify the applicant for patent of what is claimed. I think an omission to file this abstract should be treated as an irregularity only, and not as a defect that vitiates the adverse claim. No one is injured by the omission, and it would be extremely technical to treat it as good cause for rejecting the claim.

Allegation of official character by president of a company in an adverse claim, sufficient.

I have now noticed all the objeetions mentioned by the Commissioner. Some others have been urged on the argument on appeal. It is objected that the affidavit to the adverse claim of the Jenny Lind company was made by W. J. Hooper, as president of the company, and that there is no sufficient evidence that he was president. It is claimed that the best evidence would be a certified copy from the record showing his election. Hooper states in the adverse claim that he is the president of the company, and swears to that statement. That is, I think, sufficient.

It is further objected that there is no sufficient evidence that W. M. Gillespie, before whom Hooper made the affidavit, was a notary public, or had authority to administer oaths. The certificate of Gillespie is under his official seal as notary public. That is sufficient evidence of his being notary. The power to administer oaths is given to notaries public in any State or Territory, by the act of Congress of September 16, 1850 (9 Stat. 458). It is also objected that one of the affidavits on file purports to have been made before a person as justice of the peace, and that there is no evidence that such person was a justice of the peace, except his own signature as such justice.

It is the constant practice in the land office to receive and consider affidavits made before persons professing to act as justices of the peace, without other evidence of their authority, and it would take those who practice in that office by surprise to enforce the rule that such affidavits could not be considered without proof of the official character of the persons before whom they are taken, and who profess to be justices of the peace. I think the objection altogether too technical, and that it should be overruled.

It is further objected that in certain of the adverse claims

there is not sufficient evidence that suits have been brought on such claims, within thirty days from the time of filing them with the Register.

It appears from the certificate of the clerk of the court, that the persons who brought the suit, and are alleged to compose the unincorporated company, are not the persons who originally located the claim, and therefore it is said the company is not the one which filed the adverse claim.

Mining claims are constantly changing owners. They are often assigned after location and before patent. The members who own the stock at the time suit is brought are the proper parties plaintiff, and it does not follow that the company is not the same because the stockholders are different. They allege that they compose the company, and that, I think, is sufficient.

They are not, and should not be required to prove that they are the original locators, or that they are the identical persons who presented the adverse claim.

Some other objections are made, which present the question whether the adverse claimants are required to show affirmatively that they have complied with all the local usages and customs. I think they are not. If they have failed to comply with such usages, and a forfeiture is denounced for such failure, that is a matter of defense.

There is still another objection, of more gravity than some I have mentioned, and that is this: it is argued that all these adverse claims were improperly filed, because they were filed with the Register only, when they should have been filed with the Register and Receiver.

The sixth section of the act requires that the application for patent shall be filed "in the proper land office;" that the applicant shall post a notice of such application on the land, and file a copy of the notice "in such land office;" that the Register of the land office "shall publish such notice for the period of sixty days," and post it "in his office" for the same period; that the claimant shall file "with the Register" a certificate of the United States Surveyor that five hundred dollars worth of labor has been expended; that at the expiration of the sixty days of publication the claimant shall "file his affidavit (without saying where, but manifestly with the Register), showing that the plat and notice have been

posted in a conspicuous place on the claim, during the period of publication;" and then it proceeds that "if no adverse claim shall have been filed with the *Register and Receiver* of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent," etc.

The Commissioner, in his regulations issued under this act, required that the adverse claim should be filed with the Register, or, in his absence, with the Receiver. Of course, the Commissioner can not make the law, and if he has made a regulation that is in conflict with it, the regulation must fall.

Filing of adverse claim with the register is a filing with the register and receiver.

Is there such a conflict? Did Congress intend that these claims should be filed with both officers, or that the adverse claim should be in duplicate? It was a fact well known to Congress that the offices of register and receiver are kept together and are one and the same office. This is almost universally the case. All the records of the office are in the custody of the register. The receiver has but little to do with them. He receives the money and gives a receipt therefor, and that is the main part of his duties. A filing in the office of the register, with him, is in substance a filing with the receiver. I can not believe that Congress intended that the same document should be taken to the register and receiver and marked filed by each of them, or that two copies should be filed, one with the register and the other with the receiver. That would be to require a useless thing which should never be presumed.

I prefer to hold that a filing with the register was a filing with the register *and* receiver, within the spirit and meaning of this act.

After the most careful consideration that I have been able to give this case, I am of opinion that the decision of the Commissioner was erroneous, and I advise that it be reversed.

Very respectfully, your obedient servant,

W. H. SMITH, *Assistant Attorney-general.*

Hon. C. DELANO, *Secretary of Interior.*

[Inclosure No. 2.]

DEPARTMENT OF JUSTICE,
OFFICE OF ASST. ATT'Y-GENERAL,
WASHINGTON, D. C., November 22, 1873.

SIR: In the case of the Jenny Lind Mining Company and other adverse claimants against the Eureka Mining Company, before you on appeal from the decision of the Commissioner of the General Land Office, in accordance with your request, I had the honor to give my opinion upon the merits of the case on the thirtieth of September last. Since then other points have been made by counsel for the Eureka Company, and at your like request I will proceed to state my views upon them.

The Eureka Company objects to each of the following adverse claims, to wit: The May Henrietta lode, the Excelsior lode, and the King David lode, for the reason that they were severally sworn to by D. Cooper, as attorney, instead of by the persons, or some of them, who were alleged to be the owners thereof. The parties owning these lodes are unincorporated companies.

The seventh section of the act of May 10, 1872, provides: "That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the *person or persons* making the same."

Adverse claim can not be sworn to by agent or attorney.

It does not provide that it may be upon the oath of an agent or attorney. Without statutory authority, an attorney can not make the oath for his client. I find myself obliged to advise that the above-named adverse claims were not properly verified, and for that reason should be rejected.

It is further objected by the Eureka Company, that the protest and adverse claim of the Jenny Lind Company was sworn to but by one (W. G. Hooper), where it should have been sworn to by all the persons composing the company.

Any one of the persons asserting adverse claim may make the affidavit.

In my opinion, the statute is complied with when any one of the persons asserting an adverse claim makes affidavit to the same. Such person is the representative of all.

It is well known that mining claims are often owned by many persons living at a great distance from the mine. To require each owner to appear in the land district where the mine is located, and make affidavit before an officer authorized to administer oaths in that district (as must be done under the law), and that, too, within the sixty days of publication, would be an unnecessarily harsh administration of the law, and would in many cases practically nullify the right of presenting an adverse claim. As in legal proceedings, one plaintiff or defendant may make jurat for his co-plaintiffs or defendants, so I think one adverse claimant may make it for all his co-claimants.

It is further objected by the Eureka Company, that the adverse claim of the Jenny Lind Company is defective in this, that it alleges ownership by location of the South Extension of the Bullion lode, the Queen Victoria lode, and the Pride of the West 2d lode, while the record of location shows that they were made by persons some of whom were not members of the Jenny Lind Company, and that there is no allegation or proof that such persons have ever assigned or conveyed their interest to the company, and therefore it is urged the adverse claim does not "show" its "nature," as required by the seventh section of the act.

Law relating to adverse claims should receive reasonable construction.

I suppose that the provisions of law relating to adverse claims should receive a reasonable interpretation. They were made to be construed by local land officers, many of whom have never had a legal education, and they should be construed as men of good practical common sense would be expected to construe them. It was never intended by the law-makers that such a claim should be construed with the technical precision that a lawyer would be justified in applying to an indictment.

It was intended that the instrument should be so drafted as to inform a person of good sense that a portion of the mining claim which he was seeking to obtain a patent for, did not belong to him, but did belong to the protestant, and it was intended that this should be done with such precision as to fairly advise him of the "nature, boundaries, and extent" of the adverse claim, so that he might prepare

himself to establish, on the trial before the courts, his own and defeat the adverse claim.

I think the adverse claim of the Jenny Lind Company does furnish such information to the Eureka Company. It gives the boundaries and extent of its claim with such precision that no objection is made on that account. The objection relates to the "nature" of the claim.

It alleges that it is the "lawful owner and entitled to the possession of about eleven hundred feet of the said Eureka lode;" that it "is the owner, by location of the persons composing said association, and in possession of the following named lodes or veins of quartz and other rock in place bearing silver and other metals, viz.: the South Extension of the Bullion lode, the Queen Victoria lode, and the Pride of the West 2d lode, situated, located, and recorded in the Tintic mining district, Juab county, Utah Territory;" that "on the seventeenth day of March, A. D. 1871, the several premises hereinafter described were mineral lands of the public domain, and each contained a vein or lode of quartz and other rock in place bearing and containing silver and other minerals, and said premises were entirely vacant and unoccupied, and were not owned, held, or claimed by any person or party as mining claims or otherwise, and that while the same were so vacant, unoccupied, and unclaimed, the persons (see Exhibit B) forming the association known as the Jenny Lind Mining Company, each and all being citizens of the United States at the time, did enter upon and explore and discover the South Extension of the Bullion, containing three thousand (3,000) feet, linear measurement, which was located March 20, and recorded April 10, 1871, the Queen Victoria lode containing two thousand (2,000) feet, linear measurement, located March 17 and recorded March 18, 1871, and the Pride of the West 2d lode, containing sixteen hundred (1,600) feet, linear measurement, located June 21, 1871, and recorded September 19, 1871."

"That the said Jenny Lind company, and the persons composing the same, have continuously held and occupied and been in the actual possession of the said mining premises and lodes since the date of location of the same, with the knowledge of the Eureka company and its agents, and

without any opposition whatever from it" (Eureka company.) "That the locators of said lodes and the Jenny Lind mining company respectively, have in all respects complied with every custom, rule, regulation, and requirement of the mining laws of said mining district, and thereby became, and are, owners (except as against the paramount title of the United States) and the rightful possessors of said mining claim and locations;" and that "the vice-president of the Eureka company, at the time of his filing the application therefor, well knew that the Jenny Lind mining company was the owner in possession, and entitled to the possession of so much of said mining ground embraced within the survey and plat of said applicant, as is hereinbefore stated, and the said Jenny Lind mining company is entitled to all the silver and other metals in said Southern Extension of the Bullion lode, the Queen Victoria and the Pride of the West 2d lodes."

It further appears from the statements of said adverse claim that the Eureka company, on the tenth day of October, 1872, entered into a written contract which was proffered to the Jenny Lind company, but never executed by it, in which the Eureka offered to convey to the Jenny Lind, when patent should be issued to it, the said Bullion, Queen Victoria, and Pride of the West lodes, in consideration that the Jenny Lind company would refrain from filing an adverse claim to the application of the Eureka company for patent.

The said writing contains the following (among other things): "and whereas, said party of the first part" (the Eureka company) "has no claim to any part of said Queen Victoria, Pride of the West, and Bullion locations, their dips, angles, and spurs."

The above are the allegations of the adverse claim. I think they fairly inform the applicant for patent of its nature.

They state that the Jenny Lind company is the owner of said Bullion and other lodes, by location. It is true that some of the exhibits show that the persons who organized the Jenny Lind company were not identical with some of the locators of said lodes. But what of that? Suppose the adverse claim had alleged ownership by location and the exhibits had shown ownership by purchase? The claim

would undoubtedly have been good. The material thing is *ownership*, in accordance with the rules and regulations of miners. All that is alleged, and it is also alleged that the Eureka had full knowledge of the ownership and possession, and never asserted any claim to the contrary.

The statement in the written agreement goes further, and admits that said company had no claim to any part of the said lodes of the Jenny Lind Company. It is claimed that this admission should not be regarded in the case, because it was made pending a treaty of compromise. Grant it, yet it is the admission of a fact made without any stipulation that it should be without prejudice, and according to the American cases is receivable as an admission against the Eureka company.. Mount v. Bogart, Anthon, 190; Maney v. Carter, 4 Conn. 635; Fuller v. Hampton, 5 Conn. 416; Sanborn v. Neilson, 4 N. H. 501; Delogey v. Rentoul, 1 Martin, 175; Marvin v. Richmond, 3 Den. 58; Cole v. Cole, 34 Maine, 542.

Now, taking all these allegations as true (which must be done in determining the sufficiency of this adverse claim), and I do not see how it can be claimed that the Eureka company is not sufficiently informed of the nature of the claim. I think it was so informed, and I advise that so much of the commissioner's decision as rejected the Jenny Lind mining company's adverse claim be reversed, and so much as rejected the other adverse claims be affirmed.

Very respectfully,

W. H. SMITH, *Assistant Attorney-general.*

Hon. C. DELANO, *Secretary of the Interior.*

No. 20. 1. An agent, representing himself to act as attorney for an incorporated company, must show his authority for so acting.

2. An incorporated company may verify its adverse claim by the oath of its president or other executive officer or duly authorized agent.

3. An adverse claimant should make it appear that he is acting in good faith.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., February 12, 1876.

SIR: I have carefully considered the case of the Hawley Consolidated Mining Company v. The Mémnon Mining Company on appeal from your decision of April 3, 1875, upon an application of the Memnon Mining Company for a

patent of twenty-two hundred feet of the Sheridan Lode, Devil's Gate Mining District, Lyon county, Nevada.

The application of the Memnon Mining Company was filed at the local office February 23, 1874, and with the accompanying proofs shows that the Memnon Mining Company has the record title to the tract claimed, and that it has complied with the general and local mining laws.

Robert Apple, claiming to act by the authority of the Hawley Consolidated Mining Company, on the 23d of April, 1874, on behalf of said company, filed a protest to said application, alleging that the Hawley Consolidated Mining Company was the owner of the premises therein described.

Authority to file protest.

There is nothing in the case showing that Mr. Apple had any authority to file said protest and give notice of an adverse claim, except the statement in his affidavit that he had the authority; nor does it appear by his affidavit or otherwise that he is a member of the company in whose behalf he appears. A mere allegation of authority is not sufficient; the authority to act must be shown.*

In the case of the Eureka Mining Company v. The Jenny Lind Mining Company et al., decided November 24, 1873, it was held "that the jurat to the adverse claim required by the seventh section of said act (act of May 10, 1872), must be made by the party, and can not be made by an attorney." (Copps' Mining Laws, p. 169.)

Incorporated company.

When, however, the party in interest is an incorporated company, which can only act through an agent, from the necessity of the case, this rule must be somewhat modified. In such case, the company may verify its protest by the oath of its president or other executive officer, or it may by letter of attorney appoint some proper person to act for it, who would then be clothed with sufficient power to make an affidavit. Without such authority, a person, not an executive officer of the company, would have no right to act, and

* The statements of an assumed agent are not evidence of the fact of the agency, nor of the resumption of an agency which the party knew had once ceased. Van Dusen v. Star Q. M. Co., 36 Cal. 571.

whatever he might do in its behalf would be invalid, and should be so regarded.

The location under which the Hawley Consolidated Mining Company claims title was made long prior to the location under which the applicant claims, and from the abstract attached to the protest, it appears that said company has the record title to the tract described in said location. There is nothing, however, in the protest and affidavit filed by Mr. Apple, if treated as competent, to show that the Hawley Consolidated Mining Company or its grantors have complied with the general or local mining laws since the location of their claim, or that it was a valid, subsisting claim at the time the grantors of the applicant made their location. It appears that the Sheridan Lode and the New Port Lode are substantially the same, and by the certificate of the deputy United States Surveyor it appears that the value of the labor and improvements on the Hawley Consolidated Mining Company's claim on said New Port Lode exceeds five hundred dollars.

This may be true, but there is nothing to show that said company or its grantors performed the labor or made the improvements. It does appear that the Memnon Mining Company performed labor and made improvements on its claim, and at the filing of its application was in possession thereof.

What adverse claimant must show.

The lodes being substantially the same, the surveyor could truthfully certify as to the value of the labor and improvements, without knowing who caused them. While the adverse claimant is not bound in his protest to show a strict compliance with all of the mining laws and the usages and customs of mining districts, still he should show enough to make it clear that he is acting in good faith.

The abstract filed by Mr. Apple shows a record title in the adverse claimant of a tract two hundred feet in width, while the diagram thereto attached and made a part of the protest represents the claim as three hundred feet in width.

The nature of the adverse claim is sufficiently shown, but its extent and boundaries are very indefinite.

For these reasons, without considering others apparently equally fatal to the adverse claim, I affirm your decision.

The papers transmitted with your letter "N," of July 24, 1875, are herewith returned. Very respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

No. 21. Mineral entry should be allowed only on proof that suit had not been commenced within thirty days after filing of adverse claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 19, 1878.

Register and Receiver, Marysville, Cal.

GENTLEMEN: The application of J. B. Hewitt for patent to the west half of north-west quarter section 10, 19 north, 4 east, Mount Diablo meridian, as placer mining ground, was published from September 28 to November 30, 1877.

It appears that the adverse claim of Geo. F. Halsey et al. was filed in your office within the legal publication, to wit, on November 26, 1877.

It also appears from the affidavit of Charles H. Leggett, Deputy County Clerk of Butte county, California, wherein said land is situated, that complaint was filed in the District Court in and for said county by said adverse claimants on the twenty-fourth day of December, 1877, or within thirty days from the filing of said adverse claim in your office, and that the defendant, J. B. Hewitt, appeared and filed demurrer on the eighth of January, 1878.

It further appears from the certificate of James Green, clerk of said court, dated July 2, 1878, that in the case of Geo. F. Halsey et al. v. J. B. Hewitt, it being an adverse claim to mining ground, on the fourth of June, 1878, on motion of the attorney for plaintiffs, the cause was set down for trial for the thirteenth of June, 1878, on which last-named day, on motion of attorney for defendants and filing of defendants' affidavit for continuance, the cause was continued for the term.

It seems that you allowed the entry of Hewitt January 12, 1878, because "no notice or other evidence showing that suit had been commenced in court by the adverse claimants had been filed in this (your) office."

Your action was erroneous, and in violence of law. Section 2326, United States Revised Statutes, provides that

upon filing of adverse claim, and commencement of suit in the proper time, all proceedings shall be stayed, except the publication of notice, and making and filing the affidavit thereof.

Your action is based on failure of notice to you that suit had been commenced, while entry should have been allowed only on proof that suit had *not* been commenced.

Applicant for patent required to file such proof.

It was the plaintiff's duty and interest to advise you by official proof that he had commenced suit, but it was the defendants' duty to prove that no suit had been commenced before making entry.

The commencement of suit is a compliance with the law which is mandatory as to subsequent proceedings in your office. The requirement that plaintiff shall notify you of commencement of suit is an office regulation, and failure to observe which, while it may result in inconvenience to a delinquent, can not work a forfeiture of right, or justify this office in ignoring the law.

In this case it appears that four days prior to making the entry, the defendant appeared in court, and filed his demurrer, thus indicating that he designedly availed himself of an entry which the law at that time forbade.

The entry is hereby held for cancellation to await the adjudication of said court or other legal adjustment of the controversy. Duly notify all parties in interest, allow sixty days for appeal, and promptly report action.

Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 22. 1. Irregular publication of notice of application for patent.

2. When mining land has once been appropriated by a location made in conformity with law, the same is not subject to relocation until the first location has been forfeited for non-compliance with law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Aug. 18, 1877.

Register and Receiver, Sacramento, Cal.

GENTLEMEN: On the twenty-second March, 1877, a decision was rendered by this office in case of C. H. Seymour v. L. W. Woods and G. W. Haskell, applicants for patent

for the Woodville placer mine, Lot No. 43, T. 16 N., R. 9 E., Mt. Do. Mer., rejecting the adverse claim asserted by C. H. Seymour, as the same was not filed in due time, and as the law directs.

On the second May, 1877, there was received from Mr. Seymour a communication, in which he states that he appeals from said decision, and also makes application for a review of said case.

This communication was accompanied by a certified copy of the notice of location of the Woodville claim; an abstract of title to the Nebraska mine, and the sworn statement of said Seymour, in the nature of a protest against said application for patent. Although in the letter of transmittal Mr. Seymour uses the word "appeal," the papers filed by him are rather in the nature of a protest, and are so referred to by him in his subsequent communications and in those of the attorney for said applicants, and there can be no doubt that he intended them as such. On the twelfth of May last, the attorney for said applicants filed his motion to dismiss said protest. On the twenty-eighth May Seymour filed an argument in support of his application for a reconsideration of said decision, and in support of his protest. Other letters, arguments, and additional evidence have been filed by the attorneys for the respective parties.

It is urged by the attorney for the applicants for patent that a rehearing should not be granted in this case, as Seymour has already been accorded his day in court.

The only question determined by decision of this office of March 22 last was that a judgment of the court against the applicants for patent and in favor of a third party can not operate as a bar to the issuance of a patent to applicants who have shown compliance with law, unless such judgment is based upon a suit brought upon an adverse claim filed in the manner and within the time prescribed by the statutes.

This office is only authorized to issue patents for mineral claims where there has been a substantial compliance with the prerequisite conditions imposed by the statutes, and the proofs submitted are carefully examined, not only in *contested* but in *ex parte* cases.

As in the case under consideration the law has been

strictly enforced against a party who, notwithstanding he failed to assert his adverse claim within the statutory period, has been adjudged by a court of competent jurisdiction the rightful owner of a portion of the premises in question, so should the law be strictly enforced against the applicant.

Among other objections, it is urged by the protestant that the notice of said application for patent was not published in accordance with the requirements of law. It appears by the sworn statement of N. P. Brown, which has been filed in this case, that for more than ten years last past he has been one of the owners of the Nevada Daily Transcript, a newspaper printed and published every day in the week except Monday, in Nevada City, California. That said notice was published in said newspaper on Saturday, February 28; Sunday, March 1; Tuesday, March 3; and that the notice next appeared on the tenth March. That the notice appeared in each issue of the paper thereafter until the second of May, 1874, with the exception of the eighteenth and twenty-second of March and the sixteenth and seventeenth of April.

Section 2325 of the Revised Statutes of the United States requires the Register, in case of application for patents for mining claims, to publish the notice in a newspaper to be by him designated as published nearest the claim "for the period of sixty days."

In the case of McMurdy et al. v. Streeter et al., the Hon. Secretary of the Interior held that the law "does not direct a publication once a week for eight weeks or two months, but for a certain period, viz., sixty days. The publication may undoubtedly be made in a paper published weekly, but it must cover the full period named. The time elapsing between the first and last insertions must include the full period of sixty days."

Irregular publication.

From the tenth of March to the second of May, the notice appeared in every issue of the paper excepting four, but prior to March 10 the notice appeared but three times, and a week intervened between the third and fourth insertions of the notice.

The publication of the notice appears, therefore, to have been irregularly made.

It is also urged that the Woodville placer claim is a relocation of the Nebraska placer mine, the title to eight twentieths of which is in said protestant.

The applicants for patent do not deny that the Woodville location is a relocation of the Nebraska mine, but on the contrary assert that the Nebraska location had been abandoned before the date of the relocation as the Woodville mine.

Said claim was not subject to relocation as *abandoned*, unless the same had in reality been abandoned, and become subject to relocation under the local laws and congressional enactments.

It appears that the Nebraska claim was located more than twenty years ago, and that on the second of May, 1867, the then owners, C. H. Seymour and others, made record of a plat of their claim and a notice "that they intend to work the said ground as soon as they can do it with safety and security to justify them in making the great outlay and expenditure necessary for opening and working their ground." It also appears by the abstract of title filed by said applicants that subsequent to the date of the record of said plat and notice in the County Recorder's office, transfers were made of several interests in said Nevada claim in the years 1868, 1870, and 1875.

When a mining claim is subject to relocation.

When mining land has once been legally appropriated by a location made in conformity with law, it can not be legally relocated until the first location thereof has become forfeited for non-compliance with law.

By the judgment roll of the fourteenth judicial district court, California, in case of Seymour v. Woods et al., which has been filed in this case, it is shown that the court, after a full hearing of the case, rendered judgment for the plaintiff.

This suit virtually determined the very question now under consideration, viz., whether the Nebraska location had been abandoned or not; and it was decided in the negative.

As, therefore, the Nebraska location had not been abandoned, but was a subsisting, valid claim, the premises embraced thereby could not legally be included in the Woodville location.

Had the Woodville locators acquired the interests of the respective owners of the Nebraska mine, or associated themselves with the Nebraska owners, with the consent of such owners, a relocation could have been legally made, and in no other manner.

Patent can not, therefore, issue for said premises to said applicants, as the case now stands.

Should the said applicants file in this office the duplicate Receiver's receipt, with an assignment indorsed thereon to the respective owners of the Nebraska mine of their respective interests in the same, patent will issue in the name of said applicants and said assignees. Should, however, said applicants fail or refuse to file said Receiver's receipt indorsed as above indicated, said application for patent will be rejected.

You will inform all parties in interest, and acknowledge the receipt hereof, allowing sixty days for appeal.

Very respectfully,

Your obedient servant,

J. A. WILLIAMSON, *Commissioner*.

No. 23. Application for patent for a mining claim withdraws the same from further application, and the conflicting claimant can only protect his right by filing an adverse claim and bringing suit.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Sept. 27, 1880.

MONTGOMERY BLAIR, Esq., *City*.

SIR: I have considered your request filed in this office on the twenty-third ultimo, for a review of decision of the Acting Commissioner, dated tenth ultimo, dismissing the application of J. B. Haggin for patent to the Hurricane lode, situate in Washington mining district, Calaveras county, California.

Said application was dismissed upon the ground that a great portion of the land applied for was included in the pending application of André Chavanné, and hence at the date of Haggin's application the same was not in market

Chavanné's application for patent was received by the local officers and an order for publication given. Entry was refused, however, and an appeal taken to this office; but before such refusal, the register received Haggin's application and directed notice thereof to be published. The decision of this office rejected Chavanné's application, and allowed sixty days for appeal, which have not yet elapsed. Said decision will not be operative until the time allowed for appeal has expired.

Chavanné filed an adverse claim against Haggin's application and brought suit to determine the right to the land. It is urged that said adverse claim is insufficient, is not good upon general demurrer, and should be dismissed. It will not be necessary to consider this objection unless the former ruling dismissing Haggin's application shall be reversed.

Reason of rule.

The rule which forbids the reception of an application for patent to a mining claim which conflicts with a claim embraced in a prior pending application is derived from that provision of the statute which prescribes the filing of adverse claims. Where the statute prescribes one way in which a thing shall be done it precludes every other. Chavanné having made application for patent to the Elk mining claim, Haggin, as owner of a conflicting claim, had but one method open to him to protect his interest and have his right determined.

But you now urge that, this office having decided that Chavanné's application was invalid and illegal, it was in reality no application at all, and hence the subsequent application of Haggin should be allowed to stand, the whole object of the prohibition of a second application being to compel another claimant to institute proceedings in the local court, to test the right of possession of the first applicant, and the whole reason of the prohibition fails where the first application is invalid, for no adverse claim need be filed against the application which is illegal and invalid upon its face.

But the statute goes further, and after limiting the time within which an adverse claim may be filed provides that

"thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." (Sec. 2325, U. S. R. S.)

Chavanné having filed an application for patent to the land in dispute, no other claim to the same land could be asserted, except in the manner provided by the statute, and failing to take advantage of that method Mr. Haggin was precluded from objecting to the issue of a patent, except by pointing out from the record that the applicant had failed to comply with the law. He had no right to assert any claim to the land that this office could consider.

An appropriation until final action.

It is my official duty to examine the records of all mining applications, to ascertain whether the claimant has complied with the law and official regulations. If it appear that the law has not been complied with in respect to some particular thing that should have been performed prior to the filing of said application, the case will be rejected; but my action is subject to review upon appeal, and until it becomes final by waiver of appeal or affirmance of the appellate authority, such application, in my opinion, remains a legal appropriation of the land applied for, to which no other claim can be asserted in any manner.

For the reasons stated, I must decline to change the ruling of the Acting Commissioner, as requested.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 24. A public highway not an adverse claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 29, 1871.

MESSRS. WILLIAMS & CARPENTER, *Sacramento, California.*

GENTLEMEN: * * * It would appear from Mr. Mulli's affidavit that his whole objection to the granting of a patent on said application is based upon the fact that two hundred and twenty-four feet of a certain public highway is embraced thereby.

Right of way protected.

* * * Inasmuch as Mr. Mulli has not claimed the mine in question, or any portion thereof, adversely to said

applicant, and as the right of way is fully protected by said eighth section (Act of July 26, 1866), it is held that Mr. Mulli's protest is not such an adverse claim as is contemplated by said sixth section (Act of July 26, 1866), and the Register's action in refusing to recognize it as such, is hereby affirmed.

Should a patent be issued upon said application of Mr. Blakely, the right of all parties to the use of said highway will be as secure under the law, as if the title had remained in the Government. * *

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 25. Applicants for patent have the right to examine any papers filed with the local officers in the nature of adverse claims or protest.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 4, 1873.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: In reply to the Receiver's letter of the seventh ultimo, I have to state that applicants for patent have the right to examine any and all papers that are filed with the Register and Receiver, in the nature of protests or adverse claims to their applications for patents; but in no case should the local land officers permit papers which have been filed with them *to be taken out of their office.*

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 26. CAMP BIRD MINING CLAIM.

1. Where mining claims intersect, the rights of the respective owners depend upon the actual intersection of the veins and priority of location, matters which are within the peculiar province of the courts to determine; but when there is reason to believe that a contest may arise in future, the rights of neither party should be prejudiced prior to judicial determination by the insertion of unnecessary *habendum* or *reddendum* clauses in the patent.

2. Form of reservation to be inserted in the *habendum* clause where surface ground is not claimed by applicants for patent.

3. Where parties fail to file adverse claim within the legal period they can not be recognized as parties in interest and are not entitled to the right of appeal.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, July 21, 1879.

SIR: I have considered the application of Patrick Gallagher and Charles Gallagher for patent for the Camp Bird

Mining claim, entry No. 130 of survey No. 237, in the California mining district, Fairplay land district, Colorado.

The facts of this case are as follows, viz.: A survey of said mining claim was completed by Deputy Surveyor W. H. Bradt on June 9, 1877, and approved by the surveyor-general of Colorado on July 21, 1877. By said survey the Camp Bird claim is represented as a parallelogram, one thousand five hundred feet in length by three hundred feet in width, and the amount of land contained within the boundaries thereof is represented as 10.277 acres. The survey of this lode crosses the "Adlaide lode" at nearly right angles, and the amount of surface ground contained within the Adlaide claim at the point of intersection is 2.972 acres.

The preliminary proceedings for patent appear to have been in strict conformity with the requirements of the mining law, and no adverse claim was filed or suit commenced during the period of publication.

On November 19, 1877, said applicants made entry of 7.305 acres of surface ground of said mining claim, being the exact amount of land contained within the survey thereof after deducting the surface ground contained in the Adlaide claim at the point of intersection, viz., 2.972 acres.

In the published notice of said application for patent the amount of land applied for is stated as being 7.305 acres.

On August 12, 1878, counsel for the Adlaide Consolidated Silver Mining and Smelting Company filed in your office the protest of H. D. Cooke, president, and John R. Magruder, superintendent of the Adlaide Company, in which it was alleged that the description of the Camp Bird claim, as shown by the official survey, was not sufficiently specific for the protection of the interests of said Adlaide Company, and that it was quite possible that the Camp Bird Company intended to take the land at the point of intersection of the two claims. Said protestants also stated that important testimony had been prepared, impeaching the regularity and good faith of the Camp Bird application, and asked that a clause be inserted in the patent issued on the Camp Bird claim excepting and excluding the area in conflict with the Adlaide claim.

On October 18, 1878, counsel for applicants for patent

addressed a letter to your office, in which they stated: "Our survey, application, and entry all exclude the surface ground in conflict with the Adlaide, and that such surface conflict may, in the usual terms, be excepted from our patent. No unusual clauses of reservation are therefore necessary, nor will they be accepted by us; and the right to ore at point of intersecting lodes must necessarily, under the statute, be left to judicial determination (in event of future dispute) upon point of priority."

On November 21, 1878, counsel for the Adlaide Company submitted certain affidavits wherein it was alleged that during the period of publication the owners of the Adlaide claim were assured by the owners of the Camp Bird claim, and by their attorney, that the Camp Bird claim was not intended to interfere with the Adlaide claim, nor appropriate any part of the same, and that the priority of location of the Adlaide claim was admitted.

On this state of facts you decided to approve the Camp Bird application and to issue a patent thereon, containing the following clause, viz.: "That the grant hereby made is restricted to the land hereinbefore described, which lies outside of the area of the intersection of the Camp Bird survey with the surface ground of the Adlaide lode, there being excepted and excluded from this conveyance all surface ground contained in the Adlaide location, as shown by the foregoing description, together with all veins, lodes, and ledges lying and being therein to which the said Adlaide mining claim is entitled by reason of its said location."

You also decided that the Adlaide owners had been admitted to the record as parties in interest, and were entitled to the right of appeal from your decision. Both parties have appealed from your decision, and have filed elaborate arguments in support of their objections.

Section 2322 of the Revised Statutes defines the possessory rights of locators of mining claims to be as follows, viz.:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situate on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State,

Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their location so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter the surface of a claim owned or possessed by another."

The language of this section is clear and specific in defining the rights of possession which the locators of a mining claim are entitled to enjoy, and I find nothing in the law which can be construed as limiting the right of a patentee to the enjoyment of less rights and privileges than he could lawfully claim prior to the issuance of a patent.

Cross lodes.

The only law relating to cross lodes is found in section 2336 of the Revised Statutes, and is in these words, viz.:

"Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

Under this statute the rights of the parties are made to depend upon the fact of actual intersection of the vein and priority of location, matters which it is the peculiar province

of the judicial tribunals to determine; yet, in cases where mining locations cross each other, and there is reason to believe that a contest may arise in future, the rights of neither of the parties in interest should be prejudiced prior to a judicial determination thereof by the intersection of unnecessary *habendum* or *reddendum* clauses in the patent.

In this case the Camp Bird company has not entered and is not asking for a patent for the surface ground embraced in the Adlaide claim at the point of intersection of the two claims, yet its vein may extend through the ground belonging to the Adlaide and still not intersect with the Adlaide vein. In that event, the right of the Camp Bird owners to pursue said vein through the ground of the Adlaide at the point of intersection of the two claims is vested by law, and ought not to be limited by the patent; while on the other hand the right of the owners of the Adlaide to pursue their vein is equally well protected by the statute, and should not be prejudiced by the grant of the Camp Bird company.

Under the circumstances of this case, the only way by which the interests of both parties can be fully protected is by making the excepting clause in favor of the Adlaide company as broad as the granting clause to the Camp Bird company; for, by so doing, both will receive all that the law gives them, and neither will have any legal advantage.

It is a familiar principle of law that a reservation in a *reddendum* clause in a deed by a grantor, to be valid, must be made to one of the grantors and not to a stranger to the deed: 2 Bl. Com. 299; Co. Lit. 47; Fouchs, 80; Cruise Dig., tit. 32, c. 24, sec. 1; and I am therefore of the opinion that the exception should be contained in the *habendum* clause.

Form of reservation.

The following form will, in my opinion, fully protect the interests of both parties, viz.:

"Have given and granted, and by these presents do give and grant unto the said Patrick Gallagher and Charles Gallagher, and to their heirs and assigns, the said mining premises hereinbefore described as ———, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of ——— linear feet of the said Camp Bird vein, lode, ledge, or deposit, for the

length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits throughout their entire depth, the top or apexes of which lie inside the exterior lines of said survey at the surface extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the side lines of said survey: *Provided*, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical plane will intersect such exterior parts of said veins, lodes, ledges, or deposits, excepting and excluding, however, all that portion of said surface ground embraced by mineral survey No. 254 of the Adlaide mining claim; and also excepting and excluding all veins, lodes, ledges, or deposits, the top or apex of which lies inside of the exterior lines of said Adlaide survey at the surface extended downward vertically, or which have been therein discovered or developed: *Provided*, That nothing contained in this grant is intended to interfere with the legal rights of said claimants in case said veins are found on exploration to intersect with each other."

Inasmuch as the owners of the Adlaide lode failed to file an adverse claim and commence suit within the period prescribed by law, I am of opinion that your ruling that they were entitled to the right of appeal, as parties in interest, was erroneous.

Your decision is modified in accordance with the views above expressed, and the papers transmitted with your letter of March 24, 1879, are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary*.

The Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 25, 1879.

SIR: Referring to my decision of the twenty-first instant, in the matter of the application of Patrick Gallagher and

Charles Gallagher for a patent of the Camp Bird mining claim No. 130, of the survey No. 237, in the California mining district, Fairplay land district, Colorado, you are hereby instructed to insert in the form prescribed in said decision the words "fifteen hundred," so as to make the clause read as follows: * * * "with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of fifteen hundred linear feet of said Camp Bird vein, lode, ledge," etc. * * *

Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 27. Case in which adverse claim was sought to be filed where there was no surface conflict of claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 22, 1879.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: I am in receipt of your letter of the thirteenth instant, transmitting papers in the matter of the adverse claim of John T. Gilmer, Monroe Salisbury, and Orange J. Salisbury, owners of the Saratoga lode, of which entry has been made, against the application for patent to the Bulldozer mining claim, made July 30, 1879, by S. H. Wooster et al.

Said adverse claim was filed during the period of publication, and the ground upon which it is based is, briefly stated, as follows: The Saratoga lode lies nearly parallel to the Bulldozer, for a distance of about one thousand one hundred and fifty feet, and at the nearest point their side lines are about three hundred feet apart. The owners of the Saratoga claim allege that their lode dips under the Bulldozer, and is in fact the lode upon which the Bulldozer, a subsequent location, was located. No conflict of surface ground is alleged.

Motion was made by applicants for patent to dismiss said adverse claim, which motion was granted, and the case comes before this office from such action.

Reason for rejection.

Your order dismissing said adverse claim is approved, for the reason that there is no conflict of surface ground, and that the land outside the Saratoga lode will be sold, subject to the right of the Saratoga owners to follow the dip of their vein under it, and extract their ore.

United States mining patent contains provision granting right to follow dip or vein.

Such condition is inserted in proper form, in every patent for lode claims. It is a perfect protection for all rights such as are claimed by the adverse claimants in this case, and granted under section two thousand three hundred and twenty-two, Revised Statutes. The same condition, in favor of adjoining owners, will be inserted in the patent to the Saratoga lode, when issued. There is nothing in the statute prohibiting, either expressly or by implication, the sale of land adjoining any mineral claim, patented or otherwise. To the contrary, it is distinctly contemplated that adjoining land may be patented to and owned by other parties, and the rights of the owner of a lode or vein which dips under the surface ground of an adjoining claim are clearly defined. The adverse claim now in question is in fact based upon the proposition that parties other than the owners of the Saratoga lode have not the right to locate, and that this office has not the right to sell claims adjoining the Saratoga survey, because its lode may dip under the claims so located and sold. The nature of this proposition is not such as constitutes an adverse claim within the meaning and intent of the law. The statute protects, by its operation, the very interests sought to be defended by the adverse claim.

Statute contemplates surface boundaries.

By reference to section two thousand three hundred and twenty-six, Revised Statutes, it will be seen that "boundaries and extent" of adverse claims must be shown before they can be entertained. The statute unquestionably contemplated surface boundaries. Locations, the records of same, surveys, and patents are all predicated upon surface measurements. The boundaries and extent of the adverse claim, which are required to be shown, can not be construed to refer to the underground limits to which possibly or

probably the claim may be shown, after development, to extend; and the statute provides for rights under the surface in another manner. Duly notify all parties hereof, allow sixty days for appeal, and report action to this office.

Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 28. ACT OF 1866.

The right to follow a vein under adjoining land does not create a "controversy" or "opposing claim" under the second section, nor an *adverse claim* under the third section.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., February 24, 1873.

SIR: I have considered your decision, rendered May 27, 1872, in the matter of the application of the Julia Gold and Silver Mining Company for patents for the Julia, Scheel, La Cata, South-east Extension of the Hale and Norcross, and the Sarah Ann lodes in Nevada.

The facts are as follows:

On the thirtieth September, 1871, applications for patents for these claims were filed in the Register's office, at Carson City, Nevada, and notice was given in the usual manner, for ninety days. On the twentieth of December, 1871, and before said ninety days had expired, Mr. Isaac L. Requa, in behalf of the Chollar Potosi Mining Company, filed, in behalf of said company, a protest against issuing patents for said claims, on the ground that, on the fourth of February, 1870, a patent had been issued to said Chollar Potosi Mining Company for their claim on the Comstock lode; that they are still the owners of the property described in said patent; that said lodes, for which the Julia Gold and Silver Mining Company has made application for patents, are the same which underlie the ground embraced in the patent issued to this Chollar Potosi Mining Company; and that underlying the land claimed by the Julia Company, there exists no other vein, lode, or lodes, than such as are embraced in the patent to the Chollar Potosi Company. Wherefore, the Chollar Potosi Company pray that all proceedings may be stayed until the rights of the respective parties shall have been adjudicated in the proper local courts.

No surface conflict.

There is no claim on the part of the Chollar Potosi Company, that their *surface rights* conflict with the *surface claims* of the Julia Company. The patent to the Chollar Potosi Company is for fourteen hundred (1,400) linear feet of the Comstock lode, the premises granted being bounded on the east and on the west by the walls of the Comstock lode, not yet definitely ascertained, containing 34.74 acres, more or less.

It appears that the Julia lode was located May 25, 1863; the Scheel lode, February 28, 1866; the La Cata lode, March 9, 1866; the South-east Extension of the Hale and Norcross lode, October 22, 1866; and the Sarah Ann lode, March 18, 1868; in accordance with the local rules and customs of miners, and the record title to the whole of the property thus located is now in the Julia Company.

It also appears that no legal proceedings have been instituted against the Julia Company calling in question its right to patents. It further appears, that the Julia Company has in all respects complied with the mining laws, and all the rules and regulations made in accordance therewith, which are necessary to be complied with, before asking for patents for the several claims.

The question thus raised, is whether the protest entered by the Chollar Potosi Company against the issuance of patents to the Julia Company, and the reasons assigned by the Chollar Potosi Company for such protest, constitute "an adverse claim" within the meaning and spirit of the third and sixth sections of the act approved July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes." (14 Stat. 251.)

In order to understand and correctly decide this question, it will be necessary to consider the various provisions of said act, and thus to arrive at its true construction and the legal intent of its authors.

The first section of the act enacts that "the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject

also to the local customs and rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The second section provides that when any person claims a vein or lode of quartz, etc., having occupied and improved the same according to the local customs where the same is situated, and having expended thereon, in actual labor and improvements, an amount not less than a thousand dollars ($1,000), and "in regard to whose possession there is no controversy or opposing claim," such claimant may file in the local land office a diagram, and enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations to any depth, although it may enter the land adjoining, "*which land adjoining shall be sold subject to this condition.*"

The third section makes provision for a notice of the intention of the applicant to apply for a patent, and directs the Register of the land office in regard to the manner of publishing the notice for such claim; and provides that, after the expiration of ninety days from such publication, if no "adverse claim" shall have been filed, the Surveyor-general shall survey the premises, and make a plat thereof, indorsed with his approval, and then declares that upon the payment to the proper officer of five dollars ($5) per acre, together with the cost of such survey, plat, and notice, and the giving satisfactory evidence that the diagram and notice have been posted on the claim during the period of ninety days, the Register of the land office shall transmit to the General Land Office such plat, survey, and description, and a patent shall issue for the same.

The sixth section provides that whenever "an adverse claimant" to any mine located as aforesaid shall appear before the approval of the survey, as provided in the third section, proceedings shall be stayed until final settlement and adjudication in the courts of the "rights of possession to such claim," when a patent may issue, as in other cases.

It will be observed that the second section, after pointing out what is to be done by any person or association claiming a vein or lode of quartz, before a patent is issued to such person therefor, describes it as one "in regard to

whose possession there is no controversy or opposing claim." It also provides that when the patent is issued granting such mine, the right to follow the vein or lode, with its "dips, angles, and variations to any depth, although it may enter the land adjoining," is distinctly recognized. Then it is enacted that the "land adjoining shall be sold subject to this condition." The sixth section then provides that when an "adverse claimant" to any mine shall appear, all proceedings shall be stayed until the courts shall determine "the right of possession to such claim."

In this case the Chollar Potosi company assert no right of possession to the premises for which the Julia company ask patents. In regard to the surface possession of the property sought to be patented by the Julia company, there is no "controversy" nor "opposing claim." It is asserted, however, that the Comstock lode, previously patented to the Chollar Potosi company, underlies the surface of the several claims for which the Julia company ask patents, and it is also asserted that there is no lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, beneath the surface of the several claims of the Julia company, except it be the Comstock lode, embraced in their patent before referred to. Is this such an "adverse claim" to the "possession" or "right of possession" of the Julia company as is referred to in the third and sixth sections of the act? Does this raise a "controversy" or "opposing claim" in regard to the "possession" of the property for which the Julia company is seeking patents? If so, how is the adjoining land to be sold subject to the rights of the Chollar Potosi company? If, by merely asserting that the lode patented to this company is the only lode underlying the land claimed by the Julia company, they can prevent the issuance of a patent to the Julia company until the question is settled as to whether their assertion is correct or erroneous, how can such "adjoining land" ever be sold "subject to the rights" of the Chollar Potosi company?

The chief purpose of this mining law is to open all the mineral lands of the country to "exploration and occupation," and thus to encourage and stimulate mining operations. Hence the fourth section of the act limits the quantity of surface which any individual may take, to two

hundred feet in length, and provides that no person shall make more than one location on the same lode, and that not more than three thousand feet shall be taken in any one claim by any association.

Right to follow dip not an adverse claim.

It seems to have been foreseen by the authors of this law that, without some unmistakable expression authorizing "land adjoining" to be sold, difficulties such as this case presents might arise, and to prevent this, and keep open and free to "exploration and occupation" all the mineral lands of the nation, it was enacted that land should be disposed of in very limited quantities, and that lands "adjoining" those first located should remain open to exploration and sale, subject to such rights as might have vested in the first locator. Considering this act in all its parts, keeping each of its provisions in view and observing the relations of one to the other, it seems clear to my mind that in establishing this system for the sale of the mineral lands, it was intended to allow the first patentee to follow his vein, though it may lead him under "adjoining lands." It seems equally clear that it was also intended that such "adjoining land" should be sold subject only to this right; and it seems equally clear that their right to follow a vein under adjoining land does not create a "controversy" or "opposing claim" under the second section, nor an adverse claim under the third section, to the possession of him who enters the adjoining land for mining purposes.

There is, in this case, no controversy about the "possession" of the surface of the several claims for lodes made by the Julia company, and hence I conclude that the Chollar company has made no such "adverse claim" to the property sought to be patented by the Julia company, as is necessary, by the act aforesaid, in order to require proceedings to be stayed until "final settlement in the courts of the rights of possession to such claim" be had. To allow any other construction would enable the first patentee greatly to obstruct the sale of the mineral lands; for, if a previous patentee sees fit to claim that his vein or lode underlies adjoining land, he can prevent this land from being patented to an indefinite extent of surface, until the fact is ascertained by legal proceedings whether such claim

is true or false. He may thus suspend the sale of "adjoining land," and, indeed, prevent any sale "subject to his rights," because he will require these rights to be determined before the adjoining land is patented.

By issuing a patent to the Julia company the legal rights of the Chollar Potosi company can not be impaired, because the patent itself, following the direction of the statute, will provide that the adjoining lands are sold subject to the rights of the Chollar Potosi company. That company, if satisfied that its vein or lode is the only one underlying the surface claimed by the Julia company, can enjoin, in a court of equity, the Julia company from proceeding to take minerals previously patented to the Chollar company, and, upon making good their allegations, will at once obtain a perpetual prohibition of the Julia company from proceeding to take such minerals.

This construction of the act will enable the government to proceed to sell "adjoining land," "subject to the rights" of previous patentees, and will prevent the first patentee from prohibiting the government the exercise of this privilege, when adjoining lands are found which are supposed to contain other lodes or veins of minerals than such as have been previously patented. I can not eradicate from my mind the necessity of this construction. Any other view of it seems to me unreasonable, and against the spirit of the entire act, with a strong tendency, at least, toward an adherence to the letter, rather than to follow the reason of the law. I therefore affirm your decision, and direct that patents be issued to the Julia company for its several claims, which, on their face, shall show that they are issued subject to the legal rights of all previous locators or patentees.*

* From an October (1880) number of the Mining Record:

A Legal Decision.—In the case of Van Zant, trustee, v. Argentine Mining Company, of Leadville, asking for an injunction restraining defendants from working within the side lines of the plaintiff, the following plea was put in by defendants.

"First, because the deed to plaintiff was void, in that the grantors had previously conveyed to the Adelaide Con. Silver Mining and Smelting Company; second, because the plaintiff had not discovered the vein upon which the defendants were working within the plaintiff's side lines; third, because the defendants claimed to be working the vein of the Pine Lode, the apex of which was found within its side lines; fourth, because, under the act of 1872,

I am the better satisfied with this conclusion, because I understand that it conforms to the uniform practice and rulings of your office since the passage of what is termed the Mining act.

The papers are herewith returned.

I am, sir, very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND, *Com'r General Land Office.*

No. 29. Where there is no surface conflict there should be no stay of proceedings upon an adverse claim filed by another claimant.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 28, 1880.

Register and Receiver, Leadville, Colorado.

GENTLEMEN: I have examined the papers submitted, constituting the adverse claim of John W. Jacques, as part owner of the "Smuggler Lode," against George B. Robinson et al., claimants and applicants for patent to the "78 Lode," and have arrived at the conclusion that the allegations of fact set forth by said Jacques in his sworn statement are insufficient to constitute a valid adverse claim.

The two claims in dispute are located at right angles to each other, and the surface boundaries do not in any wise conflict or come in contact, but, on the contrary, are separated at their nearest approach by the surface ground of survey No. 368 of the "Undine" Lode, a distance of about 70 feet.

The 78 Lode was located September 20, 1878, and the Smuggler Lode, November 18 of the same year.

The facts alleged by the adverse claimant are in sub-

plaintiffs could not make a valid location unless they had found the top or apex of their lode within the limits of the claim located, although they may have discovered a vein of mineral in rock in place below the surface.

"Judge Hallet, of the United States District Court, overruled the objections, and granted the injunction asked for by the plaintiff, saying, in substance, that the plaintiff's title was complete, and that it was not necessary that a locator should discover the apex of a vein or lode within his extension boundary lines in order to acquire title; that when a vein or mineral deposit was discovered, the locator acquired the right to all mineral bodies underneath the surface of his claim, as against subsequent locations having the top or apex within their side lines; that the strike of defendants' lode, so far as the evidence showed, crossed defendants' claim obliquely, in which case the side lines became the end lines, beyond which defendants could not go."

stance, that said Smuggler Lode came into possession and ownership of said George B. Robinson, who conveyed one half thereof to John W. Jacques, adverse claimant herein, and that at the date of said conveyance said Robinson was also owner of one half of the 78 Lode. That the pitch of the 78 Lode is toward the Smuggler Lode at an inclination of about eighteen (18) degrees, and that if patent be granted to said 78 Lode, with the right to follow it in its downward course outside of the vertical side lines of the claim, it would convey to said applicants for the 78 Lode the right to extract all the ore in the Smuggler Lode, thus defeating the effect of the conveyance from Robinson to Jacques. It is further alleged that the Smuggler Lode and 78 Lode are one and the same vein.

If the formation of the vein of the 78 claim is such that a patent will give its owners the right to extract all the ore in the Smuggler Lode, then the 78 owners have the right already, for the patent merely conveys the fee, while their possessory title assures them all the rights to extract the ore which are conveyed by patent, and if there has been an illegal entry upon the domain of the Smuggler claim, and ore extracted therefrom which belongs to the owners of the Smuggler, such proceedings are wrongful acts which are the subject of proceedings in a court of competent jurisdiction, whether the 78 claim is patented or not.

Moreover, if the alleged fact be true that a patent would give said right, it follows that the Smuggler location is based upon a discovery of the lode or vein to which the 78 claimants have, by reason of priority of location, the better right, and is a confession by the Smuggler claimants that the top or apex of their vein is within the boundaries of the 78 claim.

As it is shown by the plat filed that the Smuggler location is nearly at right angles with that of the 78 claim, and that their surface boundaries do not conflict or come in contact, the end line of the Smuggler lying opposite the side line of the 78, it is clear that the Smuggler has no right beyond said end line, and the question whether the 78 Lode extends under the Smuggler by its lateral dip is one which in no manner affects the right to a patent for the 78 claim. If the 78 vein does so extend, the right of the owners is clear.

If, however, the true course of the vein on which both the 78 and the Smuggler claims are located is crosswise the 78, then under the decision of the Supreme Court of the United States in the case of the Flagstaff Silver Mining Company v. Helen Tarbet (see Copp's Land Owner, June, 1879,) the side lines of the 78 location are the end lines of their claim, and the courts will restrain them from proceeding further. In short, if all the allegations of the adverse claimants are true, they constitute no objection to the issue of patent to the 78 Lode.

The 78 Lode is the prior location and is not alleged to conflict as to surface rights; hence the adverse claim would not be good on general demurrer, and should not work a stay of proceedings. If the 78 claimants should mine beyond where it is their right to mine under the law, it would be simply a trespass, to be restrained by injunction and punished by damages obtained by proper proceedings in court.

No surface conflict — No stay of proceedings upon adverse claim.

The rule governing in cases where there is no surface conflict is stated in the decision of the Hon. Secretary of the Interior of twenty-fourth February, 1873, in the matter of the application of the Julia Gold and Silver Mining Company for certain claims in Nevada (Copp's Mining Decisions, pp. 101, 105). I construe this decision to mean that where there is no surface conflict no stay of proceedings should be had upon an adverse claim filed by the owners of another location, but that the surface shall be patented leaving subsequent developments to determine the rights of the respective claimants.

The proposition advanced that Robinson by his conveyance to Jacques of a half interest in the Smuggler Lode, being at the same time part owner in the 78 Lode, passed the right to extract the ore beneath the Smuggler location, a right which had theretofore pertained to the 78 Lode, is one of doubtful force, and in any event is wholly immaterial to the present controversy, for even if well founded the right will obtain as well after issue of patent as before.

For the reason stated I must dismiss the adverse claim of

John W. Jacques, and hold that George B. Robinson et al. are entitled to patent to the 78 Lode.

The Receiver's receipt and Register's certificate are herewith returned for correction, as they designate the claim as lot No. 368 instead of lot No. 369.

You will notify all parties in interest hereof, allow sixty days for appeal, and thereupon report to this office.

Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 30. Adverse claim must be actually surveyed by United States Deputy Mineral Surveyor.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, July 17, 1873.

Register and Receiver, Prescott, Arizona.

GENTLEMEN: This office has examined the papers in the matter of the application of the Tiger Silver Mining Company, for patent for twelve hundred linear feet of the Tiger lode, situated in Tiger Mining District, Yavapai County, Arizona.

The application for patent was filed with the local land officers on the first April, 1873. The agent for the applicant filed proof of compliance with the mining law, and an abstract of title from the office of the County Recorder, showing the record title to the premises claimed to be in the applicant for patent.

On the thirty-first May, 1873, and before the expiration of the sixty days publication required by law, Calvin Jackson for himself, W. J. Tompkins, H. H. Partridge, and G. D. Kendall, by J. H. Park as agent, filed a protest against the issuance of a patent for said Tiger lode, alleging that two hundred feet of the said lode and premises, as described in the application, belongs to them.

This protest or adverse claim is not made out in accordance with the law and instructions from this office, and can not operate as a bar to the issuance of a patent as applied for.

The seventh section of the mining act of May 10, 1872, declares "that where an adverse claim shall be filed during the period of publication, it shall be upon oath of the per-

son or persons making the same, and shall show the *nature, boundaries, and extent* of such adverse claim," etc.

The instructions of this office, contained in circular of June 10, 1872, paragraph forty-nine, require that in "order that the 'boundaries' and 'extent' of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat, showing his claim and its relative situation or position, with one against which he claims, so that the extent of the conflict may be the better understood. This plat *must be made from an actual survey by a United States deputy surveyor*, who will officially certify thereon to its correctness, and, in addition, there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim of the adverse party," etc.

There must be an actual survey of the adverse claim.

There is nothing with the papers in this case to show that "an actual survey" was made of the premises claimed by the adverse claimants. A plat was filed, but no surveyor has officially certified thereon as to its correctness. There is no certificate or sworn statement by a surveyor, "as to the approximate value of the labor performed or improvements made upon the claim of the adverse party," either attached to the plat or on file with the case.

The protestants allege that they were prevented from having a survey made, "as the agent of said Tiger Silver Mining Company refused to allow the deputy surveyor, C. B. Foster, whom these claimants had engaged to survey and plat the same, to go on to the plat and survey of said company for that purpose."

With the papers in the case is found an affidavit of C. Burton Foster, who swears that he is the deputy mineral surveyor, and that these adverse claimants never made application to him for an official survey of any part of the claim described.

No evidence is on file, showing that Calvin Jackson is the authorized agent for Partridge and Tompkins, nor does it appear that J. H. Parks, as agent for G. D. Kendall, made oath to the adverse claim, as required by the law.

Edward W. Wells, before whom Jackson makes oath,

signs as "Clerk District Court, Yavapai County, Arizona," but there is no seal attached to the jurat.

Parties, to have their adverse claims considered, must comply with the law and instructions, as fully set forth in circular of June 10, 1872.

You will notify all parties in interest that the said protestants, in the opinion of this office, have failed to make out such an adverse claim as is contemplated by the seventh section of the act of May 10, 1872.

Your action, in allowing the entry of the premises claimed, is accordingly approved.

Should no appeal be taken within sixty days from date of notification, you will so notify this office, when patent will issue to the applicant.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., December 11, 1873.

SIR: I have examined the appeal of Calvin Jackson et al., from your decision of July 17, 1873, rejecting their adverse claim to the application of the Tiger Silver Mining Company, for patent for one thousand two hundred feet of the Tiger lode, situated in the Tiger district, Yavapai county, Arizona.

I affirm your decision, and herewith return the papers transmitted with your letter of the twenty-eighth of October last.

Very respectfully,

C. DELANO, *Secretary.*

Hon. W. DRUMMOND, *Commissioner General Land Office.*

No. 31. There should be an actual survey of the adverse claim; and the adverse claimant should not be allowed to color a portion of the applicant's plat of survey to represent the extent of his claim.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., September 9, 1874.

SIR: I have examined the case of R. C. Chambers et al., applicants for patent of the Daniel Webster and Homestead mines, in which you rejected the adverse claim of T. H. Bates et al., by your decision of February 7, 1874.

You rejected it for two reasons: 1. The adverse claimants failed to make a survey of the same; and, 2. They did not record their claim as required by local law.

The adverse claim as set forth in the protest is described as follows: The said Bates et al. "are the lawful owners, and entitled to the possession of eight hundred feet linear measure of the said mining claim, six hundred feet thereof being on and within the boundary of the said Homestead mining claim, and two hundred feet of the said eight hundred being on and within the boundaries of the said Daniel Webster mining claim, as described in the said applications, as shown by the diagrams posted on the said several claims." In what part of the Homestead and Daniel Webster claims the eight hundred feet are located is not stated, but there is a reference made to an exhibit in these words: "Contestants do present the nature of their adverse claim, and do fully set forth the same in the affidavit hereto attached marked exhibit A, and the further exhibit thereunto attached and made part of the said affidavit."

The affidavit referred to is about as indefinite as the protest. It alleges that Bates is the owner "of an individual interest of three hundred feet of that portion of the said Homestead claim for which the said George Heart" and others "have made application for patent from the government of the United States, marked on diagram hereunto attached as exhibit B, indicated in yellow coloring and marked Eureka;" that Davis is the owner "of an undivided interest of three hundred feet of the said Homestead mining claim and the said Daniel Webster mining claim," as indicated above, and that the said Henderson is the owner of an "undivided interest of two hundred feet" of said claims as indicated on said diagram.

What the "undivided interest of the three hundred feet," etc., is, whether one fourth or one fortieth, is not stated. There is no exhibit "B" attached to the protest.

There is a diagram marked "B" found among the papers containing the survey of the Homestead and Daniel Webster lodes, with a portion of said lode colored yellow and marked "Eureka;" but it bears physical evidence that it was never attached to the protest. It is probably the paper intended to be referred to as exhibit B, but strictly is no part of the protest.

Treating it as the exhibit referred to, and it does not show upon its face how much of the eight hundred feet

claimed for the Eureka is taken from the Homestead or Daniel Webster, and yet it is the most definite description of any part of the protestants' claim, and is the very thing relied upon to excuse them from filing a survey and plat as required by the regulations, and is the exhibit which, as they allege, shows the "boundaries" and "extent" of their adverse claim.

Survey of adverse claim.

The rule that a survey must be made of the entire adverse claim is a wise one, for it may appear from such survey that what is asserted to be an adverse claim is not one in fact and law. To allow a protestant to color a portion of the applicant's survey, and treat it as his entire adverse claim, would be a very loose way of doing business, and would operate perniciously in practice, and encourage parties in setting up unfounded claims. I think it should not be encouraged or permitted.

I affirm your decision, and herewith return the papers transmitted with your letter of the thirteenth of June last.

Very respectfully,

B. R. COWAN, *Acting Secretary.*

To the Commissioner of the General Land Office.

No. 32. Where the plat of survey of an adverse claim shows a conflict with the claim of the applicant, it is not within the jurisdiction of the land office to decide that the survey showing the adverse claim is not a correct one.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 15, 1880.

Register and Receiver, Salt Lake, Utah.

GENTLEMEN: On October 2, S. H. Wooster made application for himself and his co-owner, C. H. Stevens, to enter the Phœnix Mining Claim, lot No. 211, located by himself in 1876. The claim was surveyed on August 5, 1879, and approved September 30, 1879. During the period of publication, viz., December 1, 1879, an adverse claim was filed by the Stuart Mining Company on the Constitution lode. On the fifth of December the attorneys for Wooster filed with the Register and Receiver a motion to dismiss said adverse claim. On or before December 9, 1879, suit was commenced by the Constitution claimants. On December

16 the Register overruled the motion to dismiss, and from this decision the applicant for the Phœnix has appealed. The error assigned is in effect that the adverse claim does not *correctly show* the nature, boundaries, and extent of the ground alleged to be in conflict therein, as is required by sec. 2326, Rev. Stats.

The adverse claim alleges that the Stuart Mining Company is the lawful owner and entitled to the possession of about seven hundred feet in length and two hundred feet in width of the alleged Phœnix lode, as shown by the diagram posted on said claim. Exhibit A. is the affidavit of Clayton Harris, the secretary of the Stuart Company, and recites that said company is a duly organized corporation; that it is the owner by purchase, and is in the possession of the Constitution lode and mining claim; that on the twenty-first of September, 1869, the premises embraced in the Constitution claim were unoccupied and unclaimed mineral lands, and on the day aforesaid, and while the land was so vacant and unclaimed, Henry B. Bustford, Thomas Sappington, and others entered upon and explored said premises, and located the Constitution lode; that said location was duly recorded, and that by a chain of conveyances the contestant has succeeded to all the rights of the said locators, and that they have held and worked their claim in accordance with the laws of Congress and the district mining laws. Exhibits B. and C. are the location notice and abstract of title, respectively showing title in the Stuart Mining Company; Exhibit D. is the mining laws of West Mountain District; Exhibit E., evidence of the incorporation of the Stuart Mining Company; and Exhibit F., a duly certified plat sworn to by M. F. Burgess, U. S. Deputy Mineral Surveyor, showing the relative positions of the two claims and the conflict between them, also certifying that five hundred dollars has been expended upon the claim. From these exhibits I am unable to see in what respect the adverse claim, or, more properly, the form thereof, can be considered as uncertain or defective.

The protestant has stated the facts by reason of which he claims title, and has shown the conflict claimed to exist by a duly authenticated plat made on the ground. The claimant of the Phœnix bases his motion to dismiss the adverse

claim on the ground that the plat filed by the adverse claimant for the purpose of showing the conflict is platted by other and different metes, directions, and boundaries than are given it in the official and approved survey, as well as in the field-notes and descriptions of said Phœnix claim; that the area claimed by the protestants to be in conflict embraces ground not claimed by the owner of the Phœnix in his application, while other ground that he does claim and apply for is thrown out entirely, and in this protest treated as the absolute and undisputed property of the protestant; and it is by reason of such discrepancy and the consequent failure on the part of the protestants to show the nature, boundaries, and extent of the conflict claimed to exist, that the applicant moves to dismiss the protest. He also avers that the plat put in by protestants was not made on the ground, and that it does not agree with the approved plat of survey of the Phœnix.

Plat shows conflict.

It is admitted that a conflict of surface ground exists, and it is admitted that the adverse claimant has filed a plat showing the existence of a certain conflict. Nothing more is necessary. Such plat is designed to and *does* show what the adverse claimant claims. He *might* claim an entirely different tract of ground, which if indicated on his plat would be the adverse claim contemplated by the statute. The plat, in short, is *decisive* as showing the boundaries and extent of the adverse claim. The question is not what the protestant might, but what he actually *does claim, as shown by his plat.* The question, then, that the claimant asks this office to pass upon is, "Is the survey showing the conflict a correct one?"

Argument is unnecessary to show that this office has no jurisdiction to determine such a question. The claimant claims under one survey, the adverse claimant under another; to decide, then, which of the two surveys is correct is to decide (to a certain extent) which one of the two parties in interest is entitled to the land; a question the consideration of which is vested in the courts alone. I can see no valid reason for dismissing said adverse claim.

Said appeal is therefore dismissed, and your decision affirmed. * * *

J. A. WILLIAMSON, *Commissioner.*

No. 33. 1. The nature, extent, and boundaries of an adverse claim being shown, and suit having been brought thereon in a court of competent jurisdiction, the executive department is precluded from taking action, until the controversy has been settled or is decided by the court.

2. Where adverse relocations are made prior to the application for patent controversies as to right of possession growing out of such relocations must be adjudicated in the courts.

3. Where the alleged abandonment occurred subsequent to publication of notice of application for patent, and prior to payment and entry, the executive department would be compelled to take jurisdiction.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 21, 1880.

Register and Receiver, Sacramento, California.

GENTLEMEN: I have examined the matter connected with the appeal of C. J. Wheeler, applicant for patent to the Wildman Quartz Mine, Sutter Creek mining district, Amador, California, from your refusal to permit his entry of the same.

It appears that Wheeler filed application for patent in your office, to said claim, October 2, 1879.

That said application was duly published as required by law, publication commencing October 4, 1879.

That during the period of publication, to wit, on November 13, William Sanger and David T. Davies, alleged owners of the Davies lode, filed their adverse claim in your office, and the same being in due and legal form, stay of proceedings was ordered by you.

That on the twenty-first of November, suit was commenced by said adverse claimants versus said applicant for patent, in the district court of the eleventh judicial district, in the State of California, which suit is now pending.

On the eleventh day of December next following, Wheeler made application at your office to make payment and entry of said "Wildman Quartz Mine," which application was refused by you because of said adverse claim, and the suspension of proceedings thereunder.

From your said action Wheeler appealed to this office, assigning in brief as exceptions:

1. That the pretended location of Sanger and Davies was not in accordance with section 2324 of the Revised Statutes, in that it was not marked on the ground so that its boundaries could be readily traced.

2. That the notice of said location omits to locate the pretended claim of Sanger and Davies, with reference to some actual object or permanent monument, so that it can be identified.

3. That the notice of location recites an untruth on its face, in this, "the foregoing description is taken from notice of official survey of said Wildman quartz mine, made June 18, 1875, by W. L. McKim, United States deputy surveyor, under instructions from J. A. Harderbaugh, United States Surveyor-general for California, dated April 16, 1874."

That said survey by McKim was located in township six north, range 11 east, Mount Diablo meridian, and connects it with the section corner common to sections five, six, seven, and eight of said township; while the pretended location of said Sanger and Davies fails to make any reference to the section, township, range, or meridian, and that the adoption of the field-notes of the Wildman quartz mine survey, approved by the United States Surveyor-general, as the basis of a subsequent location, is not authorized by local rules, customs of miners, or the acts of Congress relating to mines.

4. That the notice of location omits to name the mining district, county, or State within which their pretended claim is located.

5. That there is no evidence to show that the field-notes of the official survey of the Wildman quartz mine, made June 18, 1875, under instructions from Surveyor-general Hardenbaugh, include, cover, or embrace any part of the ground claimed by Sanger and Davies, in this pretended notice of location.

6. That the notice of location fails to show connection with the government survey as required by section two thousand three hundred and twenty-seven of the Revised Statutes, although a section line divides it in two parts.

7. That it fails to show that the notice of the pretended location was posted on the lode claim, or within the boundaries of the surveys admitted to be included within said pretended location.

8. That the notice of location omits to recite the number of feet owned by Mr. Sanger, in the pretended location of

Sanger and Davies on said lode, and that the notice of location omits to designate the number of feet owned by Davies in said location.

That the location of the pretended claim of Sanger and Davies does not include fifteen hundred feet in length on the vein or lode. That the notice of location pretends to locate sixteen hundred and twenty-three chains along the vein or lode.

That the record of location does not claim or locate the ledge or lode through the length of the surface ground claimed in the pretended location of Sanger and Davies.

That locations in lode claims can only be made in feet.

That the notice of location omits to name the pretended claim.

That the surface ground claimed in the pretended notice of location was on the thirtieth day of July, 1879, not subject to location as a mining claim, it having been applied for as a part of the town site of Sutter Creek, entered by the county judge as trustee, for the inhabitants of said town, on the first day of July, 1874, and patented January 20, 1875.

That said adverse claim is defective, in that they designated and named the pretended location the "Davies Quartz Mine," and it does not so appear in the certified copy of the record of location.

That the survey of J. W. Brown, filed with said protest, is defective in the following:

It was not authorized to be made by the United States Surveyor-general for California;

It is not sworn to by the said J. W. Brown;

It was a private survey made by J. W. Brown under the direction and by the request of said Sanger and Davies.

By the affidavits of said J.W. Brown it appears that said Sanger and Davies expended in labor and improvements on their pretended location about one hundred and twenty-five dollars.

That to entitle said Sanger and Davies to a survey of their pretended claim, or to the right to file a protest, they should have expended on their pretended location, in labor and improvements, a sum not less than five hundred dollars.

Section 2326 of the Revised Statutes requires, where an

adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

The adverse claim in question was presented under oath by William Sanger and David T. Davies.

Said affiants allege a failure by Wheeler and his grantors of labor or improvements required by law, and that said Wildman quartz mine was, therefore, subject to location by any other party.

Wherefore, on the thirtieth day of July, 1879, the said Sanger and Davies, citizens of the United States, entered upon, located, and claimed the said premises for the purpose of mining thereon, and designated and named the same the "Davies Quartz Mine," and occupied the same as a mining claim.

They submit with said adverse claim copy of their location notice, duly certified by the deputy clerk and recorder of Amador county.

Said location notice is dated Sutter Creek, California, July 30, 1879.

I regard this as correctly showing the nature of said adverse claim. The boundaries and extent thereof are indicated by field notes of survey, made by John W. Brown, deputy mineral surveyor, November 1, 1879.

The affidavit of the adverse claimants sets forth that said locators, at the time of said location, set stakes on the said lode and at the corners of the said claim, except on the corner in Main street and Eureka street, in the town of Sutter Creek, where it was impracticable to place stakes or monuments by reason of the constant public use of said street; and placed on the stake on the lode a written notice of location, describing the claim as located.

Said affidavit further alleges that said Davies lode and claim, and the said Wildman lode and claim, are one and the same piece of land, and are bounded by the same lines,

and the one includes and contains the whole of the other, and that said Sanger and Davis are the owners thereof.

I therefore conclude that the nature, boundaries, and extent of said adverse claim were duly alleged as required by law.

It appears from affidavits submitted by Wheeler, that in March, 1879, Wheeler directed his agent, G. W. Bibbins, to employ men and resume work on the Wildman Mine; that said work was resumed in March, 1879, and more than thirty-six dollars and twenty-five cents expended in such labor; that work was then stopped, for the reason that to successfully work the mine it required machinery, and that active operations were postponed pending negotiations for such machinery, and that since the second day of October, 1879, work has been resumed on the mine by men in the employment of Mr. Wheeler, and that they are now in quiet and peaceable possession of said property.

While it would appear in the absence of any denial of facts so alleged, that the pretended location of Sanger and Davies was illegal, and while their action in adopting as their description of such location the field-notes of the survey made by the applicants for patent in 1875 was anomalous and without precedent, yet under existing laws I feel compelled to recognize said adverse claim.

Its nature, boundaries, and extent having been shown, I regard it as one which precludes executive action, until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

It has been forcibly urged by counsel for applicant before this office, that the question of abandonment by a prior owner is one which is within the jurisdiction of the Executive Department of the Government.

By section 2324, U. S. R. S., it is provided that the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements:

In the same section, it is provided as one of the requirements that *not less* than certain amounts named shall be annually expended upon lode claims. It follows that while

the State, Territory, or district may make requirements of *more* than the amount named in the United State laws, it can not make a *less* requirement control, because it would be in conflict with the laws of the United States, which name the least sum which will preclude relocation.

Further, the local laws may require expenditures to be made in a certain manner, and within certain periods not named in the United States law; and I am of the opinion that while the conditions which determine the validity of adverse relocations are largely dependent upon local law, it is perfectly in accord with the system of the mineral laws, and was contemplated, that controversies involving the right of possession, and growing out of such relocations, should, where the relocations are made prior to the application for patent, be adjudicated in the courts.

I am also of the opinion that all adverse claims, from whatever source derived, should be presented in the manner prescribed by law, and during the period of publication of notice of application for patent, with a single exception, to wit:

Should the abandonment occur *subsequent* to such publication, and prior to entry and payment, a case would be presented of which the executive department would be compelled to take jurisdiction, because the law under that state of facts allows the abandoned ground to be again located by any qualified person, in the same manner as if no location of the same had ever been made, and makes no provision for the determination elsewhere of any question or controversy arising out of this class of conflicting claims.

Give due notice thereof to all parties in interest, allow sixty days for appeal, and thereafter report action to this office. Very respectfully,

C. W. HOLCOMB, *Acting Commissioner.*

No. 34. A diagram or plat of the adverse claim, not made from an actual survey by a United States Deputy Surveyor, not entitled to consideration.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 1, 1873.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: The papers transmitted with your letter of the eighteenth of February last, in case of the application

of Moses Hirschman and William Ottenheimer, for patent for fifteen hundred linear feet of the War Eagle mine, American Fork mining district, Utah, have been examined.

On the fourteenth of November, 1872, Moses Hirschman and William Ottenheimer filed in your office an application for patent of one thousand five hundred linear feet of the War Eagle Mine, the locus and boundaries thereof being fully set forth in the notices and diagrams posted upon the claim and in the office of the Register.

Notice of intention to apply for a patent was published for the full period of time required by law, in the Utah Mining Journal.

The abstract of title on file with the case shows that the applicants for patent have the record title to one thousand five hundred feet of said mine, by purchase from the original locators and their grantees.

It appears that a greater width of surface ground is embraced in said application for patent than the local law allows. If this be true, the width of the claim must be diminished to conform to the local law before entry.

The applicants also filed proof of citizenship and proof of compliance with the law and instructions of this office. On the eleventh of January, 1873, A. H. Huyett filed in your office an adverse claim to said application. This adverse claim is informal, and insufficient to suspend proceedings upon said application for patent, for the following reasons:

Said adverse claim is not made out in the form prescribed by the act of May 10, 1872, and the instructions of this office thereunder.

The seventh section of the mining act of May 10, 1872, declares, "that where an adverse claim shall be filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim," etc.

The instructions of this office, contained in circular of June 10, 1872, paragraph forty-nine, require that, "in order that the 'boundaries' and 'extent' of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his claim and the relative situation or position with the one against which he claims, so that the

extent of the conflict may be the better understood. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness, and in addition there must be attached to such plat of survey, a certificate, or sworn statement, by the surveyor as to the approximate value of the labor performed or improvements made upon the claim of the adverse party," etc.

The record does not show that any survey was made of the premises claimed adversely.

Unofficial diagram of adverse claim.

A diagram or plat was filed which it appears was not "made from an actual survey by a United States deputy" or other surveyor. There is no certificate or sworn statement attached to said plat or diagram signed by a deputy or other surveyor as to the correctness thereof.

There is no "certificate or sworn statement by the surveyor as to the approximate value of the labor performed, or improvements made upon the claim of the adverse party," either attached to said plat, or on file with the case.

In short there is nothing in the record to show that the adverse claimant has complied with the law and instructions, requiring him to have an actual survey of the premises made.

To entitle parties to have their adverse claims considered, they must comply fully with the law and instructions, as set forth in circular of June 10, 1872.

Failure to show location of adverse claim.

Mr. Huyett filed copies of deeds from John T. Lynch et al., which show that the grantees conveyed by quitclaim deeds to Mr. Huyett, whatever right, title, or interest they may have had in the Crusade mine, but no abstract of title is on file showing when the Crusade mine was located, the number of locators, the extent of such location, or that said Lynch et al. had any interest in the mine whatever.

The adverse claimant having failed to comply with the law and regulations, requiring him to show, under oath, the nature, extent, and boundaries of his adverse claim, and, therefore, having failed to make out a case showing a formal conflict with the claim of Hirschman and Otten-

heimer, the law does not authorize a suspension of proceedings.*

Where parties applying for patents for mining claims strictly comply with the law and instructions, this office is not authorized to suspend proceedings upon their said applications, at the instance of parties who comply with neither the law nor instructions.

The application of Messrs. Hirschman and Ottenheimer will therefore be taken up in its regular order, and disposed of as though no attempt had been made to file an adverse claim.

You will allow Hirschman and Ottenheimer to proceed with their application, and make entry of the premises as applied for.

You will acknowledge the receipt hereof, and inform all parties in interest.

Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner.*

No. 35. Adverse claim disregarded, because supported only by affidavit.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 19, 1872.

SIR: I have examined the appeal taken to this office from your decision of November 29, 1871, in the case of Reuben Thomas v. James P. Richards and Thomas Tippet, involving the right of Thomas to enter as a placer claim certain lands in section 27, township 16 north, range 8 east, Mount Diablo Meridian, California.

The facts in the case are correctly and fairly summarized in your decision, and raise a single question of law, viz.: Is the claim of Richards and Tippet an "adverse claim" within the meaning of the sixth section of the act of July 26, 1866, as extended to placer claims by the act of July 9, 1870? You hold that it is not.

The claim of Thomas is one which, in absence of any adverse right, is patentable. Richards and Tippet, January 10, 1871, pending the application of Thomas for a patent, filed an affidavit, alleging that they were then, and had been owners of certain portions of the claim of Thomas for

*See opinion of Assistant Attorney-general Smith, in Jenny Lind v. Eureka Mining Co., November 22, 1873. No. 19.

more than three years, and that they had worked the ground for several years. They have never filed any other or additional proof, nor have they, so far as appears, commenced any action in the local courts.

Such an affidavit, unsupported by other proof, is not sufficient evidence of an adverse claim. It does not, as required by the rules and regulations of your office, issued under these acts, and approved by the department, state in detail the nature of the adverse claim, where and how it originated, whether by purchase or location, or other material and essential particulars. It is a vague, indefinite, *ex parte* affidavit, and the failure to furnish other or more specific evidence for the period of over a year, is sufficient to raise a strong doubt as to the good faith of the contestants.

I affirm your decision, and return herewith the papers transmitted with your letter of the twenty-ninth ultimo.

Very respectfully,

C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND, *Commissioner General Land Office.*

No. 36. A claimant before the land department for patent on a mining claim who becomes defendant in a suit commenced by an adverse claimant in a court of competent jurisdiction, and who waives his claim, confesses judgment, and acknowledges the superior right of the plaintiff, should not longer be deprived of his patent for the premises to which he is legally entitled.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., February 17, 1877.

SIR: I have considered the application of O. D. Lambard for a patent for the Mount Pleasant mine, Sacramento, California.

Lambard filed application for a patent January 23, 1875. Notice was published from January 28 to April 1, 1875, inclusive.

During the period of publication, viz., March 26, Edward R. Morey filed an adverse claim, known as the "Charles mine," and commenced suit in the eleventh judicial district April 21, 1875.

On the twenty-fourth of March, Jacob B. Fisher, John Melton, and F. W. Earl filed an adverse claim, known as the "Irish mine," and commenced suit in the eleventh judicial district April 21, 1875.

On the twenty-fourth of March, Jacob B. Fisher, John Melton, and F. W. Earl filed an adverse claim, known as the "Earl mine," and on the twenty-first day of April, 1875, Fisher and Melton commenced suit in the eleventh judicial district, and at the August term of said court a judgment of nonsuit was entered in favor of the defendant. This decision was affirmed by the supreme court of California at the following January term, the court holding that "the defendant was the owner of an undivided interest in the mining claim, and as such was entitled to the exclusive possession thereof against the plaintiffs, they not having shown any title in themselves."

On the twenty-eighth of March, 1876, Fisher, Melton, and Earl commenced an action in the court of the eleventh judicial district to recover possession of said "Earl mine," and they request that said application shall be suspended until said suit shall have been determined, unless the application for patent shall be rejected.

In your decision of September 2, 1876, you held that this suit, having been commenced after the expiration of the thirty days prescribed in the seventh section of the act of May 10, 1872, can not operate as a bar to the issuance of a patent.

This decision is in accordance with that of my predecessor in the case of H. B. Morse v. Eli S. Streeter. (Copp's U. S. Mining Dec. 127.)

You also state that the application will remain suspended until it shall have been clearly established that the applicant has the possession, and the right of possession, to the premises, by virtue of compliance with the local laws or customs and the congressional enactments.

On the twenty-eighth of December, 1876, A. St. C. Denver, Esq., attorney, in behalf of the protestants, filed an argument adverse to the claim of Lambard.

December 4, 1876, the local officers transmitted additional evidence in the matter of the application of Lambard. In your decision of the ninth ultimo, you overruled the objections to the issuance of a patent, and announced that the case would be taken up at once for patenting. On the tenth ultimo, Mr. Denver, in behalf of the owners of the "Earl mine," the contestants and protestants, appealed from said decision. On the thirteenth ultimo, you informed

Mr. Denver that an appeal by a protestant did not lie from the decision of your office, and on the same day Mr. Denver appealed from said decision, claiming, first, that under the provisions of the sixth section of the act of May 10, 1872, an appeal may be taken by the protestants; secondly, that Fisher et al. did file an adverse claim and commenced suit within the time required; thirdly, that a suit is now pending before the district court, in which the property is situated, and that while said suit is pending they have the right to appear as contestants, as well as protestants, having the right to appeal from your decision, in order that their legal rights may be reviewed by the appellate authority.

I think your decision, that the suit now pending in relation to the "Earl mine" was not commenced within the time required, must be sustained; hence the parties can appear in the attitude of protestants only.

In my decision of March 24, 1876, in the matter of the application for a patent for the Boston quicksilver mine, on appeal from your decision denying the right of Mr. McGarrahan to appeal to this department, it was stated that "while it was laudable in Mr. McGarrahan to make suggestions to your office of what he believed was an attempted fraud upon the Government in the matter of this application for patent, and proper for you to accept and consider such suggestions in an examination of the case, I can hardly conceive that it will be seriously contended that he, not being a party in interest, but standing in the relation of *amicus curiæ*, has a status entitling him to an appeal. I am very clearly of the opinion that he has no such right, and therefore affirm your decision to that effect."

Applying that rule to this case, Foster et al. not being parties in interest, in the eye of the law, by reason of their failure to commence suit in time, and appearing as protestants only, have no right of appeal.

It appears, as before stated, that E. R. Morey, claiming the "Charles mine," presented an adverse claim, and commenced suit, upon complaint duly filed, within the prescribed time.

This suit was pending at the date of your decision, and, in my opinion, should have operated as a stay of all proceed-

ings before this department, as indicated in my letters of December 26, 1876, in the case of the King of the West v. City Rock, and of the third ultimo, in the case of the Last Chance No. 2.

Since the date of your decision, however, viz., on the sixteenth of February, there was filed with me a certified copy of the complaint of E. R. Morey in the suit commenced April 21, 1875, in the eleventh judicial district of California, also a duly certified copy of the following confession of judgment:

No. 2785.

In the district court, eleventh judicial district, county of El Dorado, State of California.

E. R. Morey, plaintiff, v. O. L. Lambard, defendant.

Now comes the defendant by his attorneys, G. J. Carpenter and George Cadwalader, and waiving all his other pleas in the above cause, hereby disclaims any right, title, or interest in and to the premises described in the complaint of plaintiff herein, and consents that plaintiff have judgment according to the prayer of his complaint herein.

G. J. CARPENTER,
GEO. CADWALADER,
Attorneys for Defendant.

I hereby acknowledge service of the above answer, and consent to the filing thereof.

A. P. CATLIN,
GEO. G. BLANCHARD,
Attorneys for Plaintiffs.

Indorsed—Filed February 6, 1877. George Burnham, Clerk.

Papers filed on the sixteenth instant also show that the same action was taken in the case of J. B. Fisher et al., claiming the "Irish" mine, who commenced suit April 21, 1875, as appears from the following:

No. 2786.

In the district court of the eleventh judicial district, county of El Dorado, State of California.

J. B. Fisher and John Nelton, plaintiffs, v. Orvill D. Lambard, defendant.

Now comes the defendant by his attorneys, G. J. Carpenter and George Cadwalader, and waiving all his other

pleas in the above cause, consents that plaintiffs have and recover judgment against him according to the prayer of their complaint herein.

G. J. CARPENTER,
GEO. CADWALADER,
Attorneys for Defendant.

I hereby acknowledge service of the above answer, and consent to the filing thereof.

A. P. CATLIN,
GEO. G. BLANCHARD,
Attorneys for Plaintiffs.

Indorsed—Filed February 6, 1877. George Burnham, Clerk.

It thus appears that Lambard has waived his claim to the premises in dispute, and debarred himself from asserting his right to the same in the future.

The seventh section of the act of May 10, 1872, requires that when suit has been commenced all proceedings shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

By the action of Lambard, the defendant, taken before the proper tribunal, viz., the court having jurisdiction in the case, the plaintiffs, Morey, Fisher et al., have obtained all they sought to obtain by the commencement of the suits, and the same are virtually ended, and the controversy settled. No reason therefore exists why a patent should not issue for the tract not in controversy.

The abandonment of the surface ground, or of the entire premises in controversy, before this department, and the continued prosecution of the suit, involving the same premises, before a court of competent jurisdiction, is not in my opinion a proceeding justified by a correct interpretation of the mining law, but when the applicant for a patent before this department who becomes the defendant, in a suit commenced by an adverse claimant, in a court of competent jurisdiction, waives his claim, confesses judgment, and thus acknowledges the superior right of the plaintiff to the tract in dispute, he has done all that can be required of him in thus ending the controversy, and should be no longer deprived of a patent for the premises to which he has shown himself legally entitled.

Your decision, holding that Lambard is entitled to a patent, is affirmed for that portion of the premises not covered by the claim known as the "Charles" and the "Irish" mines.

The papers transmitted with your letter of the eighteenth ultimo are herewith returned.

Very respectfully,

CHAS. T. GORHAM, *Acting Secretary.*

The Commissioner of the General Land Office.

No. 37. The mining law contemplates that the courts shall decide all questions as to relative rights of contesting claimants.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 25, 1879.

Register and Receiver, Sacramento, California.

GENTLEMEN: I have examined the papers in the matter of the application of Albert Lasey, for patent to the Valentine Gold Quartz Mine, in Glencoe Mining District, Calaveras County, California, against which M. Eldred and Wm. H. Knight filed separate adverse claims for certain portions of the mine, during the legal period of publication of notice.

You rejected the adverse claim of Knight, who appealed from your decision.

You allowed the adverse claim of Eldred, from which action Lasey appealed.

I am of the opinion that Eldred's adverse claim was properly presented, and that he shows its nature, boundaries, and extent.

He made a relocation March 23, 1876; and alleges the legal insufficiency of Lasey's location of January 1, 1876.

Courts must decide relative rights of contesting parties.

I can not undertake to enter into the relative merits of said claims, and indicate my opinion concerning the legal rights of either party. It is contemplated by section 2326, United States Revised Statutes, that the merits shall be adjudicated by the courts.* Your action upon Eldred's adverse claim is approved.

* The object of the acts of Congress of July 26, 1866, July 9, 1870, and May 10, 1872, in relation to the patenting of mining claims, was not to confer any additional jurisdiction upon the State courts, but to require parties pro-

You rejected the application of Knight to file his adverse claim, because the basis thereof was a deed dated June 29, 1870, executed by Benj. K. Thorn, sheriff of Calaveras county; that by decision of the Honorable Secretary of the Interior, dated June 13, 1878, it was found that "the claim of Knight based upon the alleged transfer of the premises by the sheriff of Calaveras county, in 1870, is also rejected; because, by the judgment of said court it was declared that the land and quartz claim described in the sheriff's deed of January 29, 1870, and under which Knight claims title, is not the land or quartz claim in controversy," and was held to be invalid; and that Knight's entry having been canceled because the application was based upon the same title as the adverse claim now presented, such adverse claim is not entitled to be received and filed as such.

The honorable secretary also stated in said decision that "the court also found that the Musquito Mining Company had been, for more than two years prior to the commencement of said action (Eldred v. Knight) owner of the premises in dispute, and that the plaintiff, Eldred, was a stockholder in said company. This decision was rendered May 2, 1876, and under date of June 16, 1876, the Musquito Mining Company executed a deed to applicant, Knight. This deed purports to have been executed for the purpose of ratifying and confirming the deed executed by the sheriff above mentioned. In your decision, you held that by reason of this deed Knight had the record title to the premises. I do not deem it pertinent or necessary at this time, to discuss the effects of this deed, or the rights that might be based upon the same under a new application; but am clearly of opinion that it in no way cures the defect in the title of Knight, upon which he bases his present application for a patent. That application must stand upon its merits as presented; the question to be determined is the issue of a patent on the same. The department can not overlook the fact that a court, under the authority of the mining law, has found that said application was fatally defective when pre-

testing against the issuance of a patent to try the right of possession, and have the controversy determined in the State courts, by the same rules, and governed by the same principles, and controlled by the same statutes that apply in other cases. 420 Mining Co. v. Bullion M. Co., 9 Nev. 240.

sented, neither has this defect been cured; it must therefore be rejected."

It is, therefore, clear that the honorable secretary assumed only to pass upon the case *as it was presented.* The case of Knight was defective when his application was made —was defective when judgment of court was rendered; and the court declared it defective. The honorable secretary passed upon that condition of things, and upon nothing else.

I do not know what Mr. Knight's present rights may be, and it is not now my duty to determine. Were I to pass upon the merits of the case from the papers now before me I might, with my present understanding of the claim of Eldred, regard his allegation of ownership of the entire Musquito mine (which is alleged to be identical with the Valentine) to be defective, inasmuch as the law, which provides a way in which the interests of co-owners, who do not make the annual expenditures required by statute, may be forfeited to such co-owners as do make the required expenditures, has not apparently been complied with, and, therefore, that the Musquito Mining Company had not lost its rights as claimed by Eldred, and in the manner by which he claims individual proprietorship. But whether said company had a title to deed to Knight for the land in dispute, I do not undertake to decide. I only know that the adverse claim is properly alleged. It is true that the said decision of the honorable secretary indicates that there are subsequent proceedings relating to said land and Knight's alleged right, which may properly be considered under a new application; and in Knight's appeal, it is also indicated as a matter of fact that he does rely upon matters subsequent to said sheriff's deed for the prosecution of his case in court; but I do not desire to discuss the case beyond the ascertainment of the fact, that the adverse claim is properly alleged.

Section two thousand three hundred and twenty-six, United States Revised Statutes, provides that "when an adverse claim is filed, during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publi-

cation of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived."

It is, therefore, unnecessary that I should advert to all the features of this case, as presented by arguments, which relate more to the merits of the respective claims than to my single duty at this stage of proceedings to determine whether there shall be a stay of proceedings until those very questions shall be adjudicated in the courts.

Proceedings stayed.

I am disinclined to usurp questionable jurisdiction. I have not the proof before me to enable me to render a well-advised decision as to the respective rights of the parties, were my jurisdiction unquestionable, and it is not incumbent on said adverse claimants to present such proof. It is their duty to properly allege their adverse claims. This has been done; and it is not my province to decide that Knight has not rights which can be successfully asserted in the courts. Moreover, the case is one which should for divers reasons be decided in the courts; and the adverse claim being in due form, I direct a stay of proceedings, as contemplated by statute, until the questions raised by both Eldred and Knight shall have been settled in the courts, the adverse claims waived, or failure to prosecute with reasonable diligence be shown.

Duly notify all parties in interest hereof, allow sixty days for appeal, and thereafter report promptly to this office.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 38. In case of an amicable adjustment between adverse claimants of a mining claim, a survey will be required to show the compromise line and the exterior boundaries.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 18, 1874.

Messrs. HAYDON AND GILCHRIST, *Washington, D. C.*

GENTLEMEN: In reply to your recent letter, I have to state that in cases where two applications for patents under

the mining acts conflict with each other, and the applicants may desire to compromise or amicably settle their disputes by each party releasing to the other a portion of the premises embraced in the respective applications, a survey will be required of that portion of each claim which may be necessary to show the compromise line agreed upon between the parties and the exterior boundaries of each claim to be patented.*

It is wholly unnecessary for this office to direct the surveyor-general to make such resurveys in cases of this kind, as he will promptly do so upon application being made to him by the parties in interest.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 39. Iowa Mining Company v. Bonanza Mining Company.

1. The question whether an adverse claim has been prosecuted with reasonable diligence, as required by section 2326, United States Revised Statutes, is for the determination of the court which has acquired jurisdiction.

2. If the defendant thinks suit is not prosecuted with reasonable diligence, he should move the court to dismiss the case for want of prosecution, and, if the motion is granted, cause the judgment to be certified to the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., June 25, 1879.

SIR: I have considered the case of the Iowa Mining Company v. The Bonanza Mining Company, involving certain mineral lands in the Virginia mining district, Carson City land district, Nevada, on appeal from your decision of October 11, 1878, adverse to the Iowa Company.

The facts of this case, as they are made to appear by the records, are as follows:

On January 11, 1876, the Bonanza Mining Company made application for patent for five hundred and ninety-three linear feet on the Lucky Baldwin lode, together with two hundred feet in width of surface-ground, situated in the Virginia mining district, Storey County, Nevada, and gave due notice thereof by publication and by posting a

*The decision of the right of possession to a mining claim involves a question of title so that it can not be the subject of arbitration under the act which provides for the arbitration of all matters, "except a question of title to real property in fee or for life." Spencer v. Winselman, 42 Cal. 479.

copy of the notice and plat on the claim in the manner prescribed by law.

On March 11, 1876, two adverse claims were filed against said application for patent; one by W. B. Murdock, and the other by the Iowa Mining Company. Suit was commenced by Murdock in the district court for the first judicial district of Nevada on March 11, 1876, but this action was voluntarily dismissed by the plaintiff on November 13, 1876, as shown by the certificate of the clerk of said court.

On April 7, 1876, the Iowa Mining Company commenced suit on its adverse claim in the same court by filing a complaint and causing a summons to be issued; and it is shown by a certificate of the clerk of said court dated May 24, 1878, that service had not been perfected on the defendant, and no further steps taken by the plaintiff in the prosecution of said suit.

On this state of facts you decided that the Iowa Company had waived its adverse claim by a failure to prosecute said suit with reasonable diligence, and that the Bonanza Company was entitled to a patent for the land on fully complying with the requirements of the mining law.

In this I think you erred.

Section 2326 of the Revised Statutes provides as follows:

"Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim."

Said section also provides for the filing of a certified copy of the judgment roll, an entry of the land, and the issuance of patents in conformity with the decree of the court.

This statute provides in plain terms that a failure on the

part of an adverse claimant to prosecute his suit to judgment with reasonable diligence, shall be a waiver of his claim, but it does not provide, either in terms or by necessary implication, that you shall decide what constitutes reasonable diligence while suit is pending in court.

There can be no question but that the State court of Nevada has acquired jurisdiction over this cause, and it is equally clear that the object of the law was to require parties claiming an adverse interest in land included in an application for patent to try the right of possession, and have the controversy determined by the State courts before a patent was issued.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause." (Elliott v. Piersal, 1 Pet. 340.)

The question of diligence in the prosecution of a pending suit is as much a question for the determination of the court as any other question of law or fact which may arise in the progress of the case, and one which, after the court has acquired jurisdiction, should be left for its determination.

Land office can not decide.

I do not think it was the intention of Congress that you should decide what constitutes reasonable diligence in the prosecution of a suit pending in a court of competent jurisdiction, for such a proceeding would necessarily interfere with matters which the court alone should determine.

Under such a practice it might occur in which you would hold that reasonable diligence had not been exercised, and issue a patent; while the court might hold otherwise, and give judgment for the adverse claimant, and the result would be a conflict of authority, and a confusion of titles, which would compel the successful parties to resort to further expensive litigation by bill in equity to procure title to the land which had been adjudged to belong to them by the courts.

I am of opinion that the proper practice in cases of this character is for the defendant, if in his opinion the suit is not prosecuted with reasonable diligence, to move the court to dismiss the case for want of prosecution, and if the mo-

tion is granted, cause the judgment to be certified to your office, when a patent can be issued without conflict with the jurisdiction of the courts, or the rights of the parties in interest.

Your decision is reversed for the reasons stated, without prejudice to the rights of either party, and further proceedings will be stayed to await the result of said suit.

The papers transmitted with your letter of April 14, 1879, are herewith returned. Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 40. The provisions of the mining law for the adjudication of adverse claims in the courts does not contemplate that the sale of the public mineral lands shall be indefinitely postponed, upon the simple filing of a complaint.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 15, 1880.

Register and Receiver, Central City, Colorado.

GENTLEMEN: Referring to my decision of June 26, 1880, in the matter of the adverse claim of Philip J. Lonergan et al. upon the Coney lode against the application of Henderson H. Eddy for patent to the Mammoth lode, in which I held said adverse claim to be sufficient both in form and substance, Messrs. Britton & Gray, counsel for applicant, have filed certificate of the clerk of court for the First Judicial District of Colorado, to the effect that on the sixteenth day of February, 1880, said adverse claimants filed a bill of complaint in said court against Eddy, involving the matter of Coney and Mammoth lodes, but that up to the second day of June last, the date of said certificate, no summons had been issued in pursuance of said complaint.

Law of Colorado.

The code of Colorado provides that "the clerk shall indorse in the complaint the day, month, and year the same is filed; and at any time within one month after the filing of the same, the plaintiff may have summons issued."

Section 2326 U. S. Revised Statutes provides, "it shall be the duty of the adverse claimant within thirty days after filing his claim to *commence* proceedings in a court of competent jurisdiction, to determine the question of the right

of possession, and prosecute the same with reasonable diligence, and a failure to do so shall be a waiver of his adverse claim." Upon the commencement of such proceedings, all action in the local office must be stayed until the controversy has "been settled or decided by a court of competent jurisdiction, or the adverse claim waived."

Suit must be commenced according to law within thirty days.

Counsel now move to dismiss said adverse claim on the ground that the adverse claimants have failed to prosecute their suit with "reasonable diligence," as required by the statute. I am of opinion that the negligence in this instance is positive; but it is also clear that the adverse claimants have not *commenced* their suit in the manner contemplated by the statute. Until a summons is issued, the court acquires no jurisdiction over the subject-matter in controversy. The law contemplates that the sale of the public lands shall not be delayed by controversies of this character for a longer period than is necessary for the proper legal adjudication of the dispute. In some States the summons may issue at any time after the filing of the complaint. In California it may issue at any time within one year.

To hold that by the simple filing of a complaint, without having summons issued, an adverse claimant may indefinitely postpone the sale of the public mineral lands was never contemplated.

It is clear that the court in the present case can not acquire jurisdiction of the matter at issue, except by the consent of the parties, without the filing of a new complaint, long after the expiration of the statutory period for the commencement of actions to decide the merits of adverse claims. I therefore allow the motion of the counsel, and dismiss the adverse claim of Lonergan et al. on the several grounds that they have not proceeded with due diligence, and have not commenced their action in the manner contemplated by law.

Sixty days are allowed for appeal, and the parties in interest should be notified hereof. Should no appeal be taken, you will allow Mr. Eddy to pay for and enter the Mammoth lode upon his filing proof of compliance with law.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 41. 1. Proof in support of an application for patent is *ex parte* in character.

2. When, after application has been made for patent, suit has been commenced to determine the right of possession, the only question that can arise in the General Land Office is whether the adverse claimant has complied with the terms of the law so as to bring his case within it.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., December 26, 1876.

SIR: On the fifteenth day of August, 1873, W. H. Pitts et al. filed an application with the local officers at Salt Lake City for a patent of a certain mining claim known as the King of the West Lode, situated in Little Cottonwood mining district, Utah Territory.

During the publication of the order made thereon, R. C. Chambers, claiming to be the purchaser for a valuable consideration of the mining claim known as the City Rock Lode, situated in the same mining district, filed an adverse claim for a portion of the tract embraced in said application, alleging prior discovery and improvement.

On the twenty-third of April, 1875, my predecessor reversed your decision of December 14, 1874, and rejected the application of Pitts et al., on the ground that the proof of the posting of the notice and diagram on the claim during the period of publication as required by law was defective.

He also rejected the adverse claim of Chambers, on the ground that he was the secret trustee of the City Rock Mining Company, of London, England, a foreign corporation.

On the twenty-ninth of the same month a motion was made for a rehearing, and on the twenty-fourth of August, 1876, I decided that my predecessor's decision should be so modified as to allow the applicants to make an entry of the tract described in their application, upon their showing compliance with law.

On the twenty-eighth ultimo the matter again came before me for a hearing by stipulation of the parties in interest upon the proofs heretofore filed in the case, subject to any legal objection thereto.

From the application of Pitts et al., and the accompanying papers, it appears that on the twelfth day of September, 1870, O. Pitts et al. discovered the lode or vein known as the King of the West Lode, planted a stake thereon, to

which they attached a notice, giving the names of claimants, number of feet claimed, and the general course and direction thereof.

Subsequently they filed in the office of the recorder of said mining district a notice of their location; the proof showing that the notice and diagram required by law to be posted on the claim during the publication of the order made upon filing the application has been supplied since my decision of the twenty-fourth of August last, from which it appears that said notice and diagram were posted on the claim and remained so posted during the time of such publication.

Objection was made on the hearing that the application does not show in terms the particular manner in which the applicants had complied with all the rules and regulations of said mining district.

In those particulars in which it is considered material that an application should show such compliance, viz., the amount of work done each year, and the possession and development of the mine, the proof shows that the applicants and their grantors did comply with the rules and regulations of said district and the laws of the United States.

It is also objected that the notice of location is too indefinite.

The application shows that upon making the discovery of the lode the locators planted a stake thereon, to which they attached a notice of their claim, somewhat indefinite, it is true, but when taken in connection with the stake and the monuments mentioned, together with their subsequent improvements, I think was sufficiently definite, and that no one could have been or was misled thereby.

Proof, ex parte.

It was further objected that the proof of posting the notice and diagram upon the claim during the publication of the order made upon filing the application was not filed in proper time.

This question was considered upon the motion for a rehearing in the case, and in my opinion the neglect to file the proof with the application was sufficiently excused by the affidavits then filed.

It must be remembered that all of the proof made in an application for a patent of a mining claim is *ex parte*, and that proof that the applicants have complied with the law is of more importance than the time or order in which it is made.

I am of the opinion that the applicants are entitled to a patent of the tract described in their application, unless their right thereto shall be defeated in part by the superior right of their adverse claimant.

The adverse claim filed by Mr. Chambers shows that on the twenty-ninth day of June, 1870, Swen Johnson et al. discovered the vein or lode known as the City Rock lode or claim; that they marked out the extent and boundaries thereof, erected a location monument, and posted thereon a written notice of their location; that on the eleventh day of July, 1870, they filed a notice of their claim with the recorder of said mining district; that said locators immediately commenced to work on said claim, and that the adverse claimant and his grantors have complied with all of the rules and regulations of said mining district.

The adverse claimant also files a map or diagram of the respective claims, showing their location and the conflict in their boundaries.

Within thirty days after filing said claim, as appears by the certificate of the clerk of the third judicial district of said Territory, Mr. Chambers commenced an action of ejectment against the applicants to recover the possession of that portion of the City Rock claim which is embraced in the application for a patent by the claimants of the King of the West lode.

It further appears by the certificates of the clerk of said court, dated October 16, 1876, that a judgment was subsequently rendered therein in favor of said Chambers and against the applicants. On behalf of said adverse claimant it is urged that upon filing the adverse claim and the commencement of said suit, under the seventh section of the act of May 10, 1872, the jurisdiction to determine the rights of the parties to the tract in controversy was transferred to said court, and that this department has no further duty to perform in the matter until a final determination shall be had of that case.

Section 7 of the act aforesaid reads as follows:

"That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim.

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claims, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess. If it shall appear from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with proper fees, and file the certificate and description by the Surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights." * * * * *

Suit.

The plain meaning of this section is that all contests which may arise in the disposal of the mineral lands shall

be tried and determined, if tried at all, in a court of competent jurisdiction; that the adjudication and determination of that court shall be final, and a patent for the tract in controversy shall issue to the successful party or parties, upon showing further compliance therewith. It is equally clear, I think, that when the court has acquired jurisdiction of the subject-matter in controversy, all other proceedings, except those mentioned, must be stayed until such determination is made, if the suit be prosecuted with reasonable diligence.

The only question which can ever arise is whether the adverse claimant has complied with its terms, so as to bring his case within it. He must file his claim during the period of publication, showing its "nature, boundaries, and extent," and bring suit for a recovery of the possession of it within thirty days thereafter, or be deemed to have waived it.

Has the adverse claimant in this case shown such a compliance? I think he has.

He filed his claim under oath during the period of publication, showing the origin of his title thereto, as well as its nature, boundaries, and extent, and brought suit within the time prescribed to recover possession of that portion of it claimed by the applicants.

To this claim, as filed, the applicants object:

1. That it differs materially from the original location, which was for one thousand feet of the City Rock lode, "extending six hundred feet northerly and four hundred feet southerly," while the claim as filed is for a tract of land lying nearly east and west.

2. That the adverse claimant has no title to the tract claimed, or, if he has, he holds it as the secret trustee of the City Rock Company, a foreign corporation, and is therefore not entitled to present a claim.

Both of these objections go to the merits of the case, and not to the form of the claim. It is unquestionably your duty, as well as mine, when an adverse claim is presented for consideration, to examine it, and determine whether the claimant has substantially set forth, under oath, its "nature, boundaries, and extent;" but if a compliance with the law is shown in these particulars, and a suit has been instituted to determine the rights of the parties, I am of the

opinion that we can proceed no further with the investigation. It is the duty of the court in which the suit is pending to determine all other questions relating to the controversy.

I therefore direct that the application of W. H. Pitts et al., for a patent of the King of the West lode, be suspended until the final adjudication and determination of the rights of the parties involved in the suit now pending in the third judicial district of Utah Territory be made, or it is shown that said suit is not prosecuted with reasonable diligence.

I herewith return the papers transmitted with your letter N, of September 21, 1876.

Very respectfully,

Z. CHANDLER, *Secretary.*

The Commissioner of the General Land Office.

No. 42. Question of jurisdiction of court must be pleaded in the court, and should not be decided by the Land Office. Former decision that a suit commenced before a court in one judicial district in California against a claim within another district, was not a suit commenced in a court of competent jurisdiction, erroneous.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C. March 23, 1880.

Register and Receiver, Marysville, California.

GENTLEMEN: On the twelfth of September, 1879, this office rendered decision in case of the adverse claim of the Nevada Reservoir Ditch Company v. Joseph Rogers et al., applicants for patent to the north half of the Blue Point Placer, Survey No. 45.

The adverse claim was rejected for the reason that the affidavit to the same was made outside the land district wherein the claim was situated, and because suit was commenced in a judicial district not embracing the claim.

On the twenty-ninth of November, 1879, and after time for appeal had expired, an application for review of said decision was filed in this office in behalf of the Nevada Reservoir Ditch Company by N. L. Jeffries, its attorney, on the grounds: 1. That the facts were not fully before this office when the case was considered. 2. That the law regulating the jurisdiction of district courts in California, as established by the supreme court of that state, was not laid before this office to enable the question to be properly determined. Both of these grounds evidently relate to the

alleged error in said decision, in holding that the district court had not jurisdiction, as no new facts are sought to be introduced, except references to decisions of the supreme court of California governing that question.

That part of said decision which relates to the question of jurisdiction was made after a careful examination of the laws of the State as found in its present code. My attention having been directed to the decisions of the supreme court on that point, I am of the opinion that the decision of this office thereon was erroneous.

I am also, upon due reflection, of the opinion that the question of jurisdiction is one which should most properly be referred to the court itself in which the action is commenced, and that to be taken advantage of, should be pleaded to before such court.

Said decision is therefore modified to this extent. The rejection of the adverse claim must, however, stand, as the failure to make oath to it within the land district is a fatal defect.

No appeal having been taken from said decision of September 12, 1879, within the period allowed by the rules of practice, the case is this day closed, and action upon the Mineral Entry No. 91 will be speedily taken.

Duly notify all parties hereof.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 43. Where suit is dismissed by the court for want of prosecution on the part of the adverse claimants, the case will not be further suspended in order that a second suit may be brought.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, November 17, 1869.

Register and Receiver, U. S. Land Office, Central City, Col.

GENTLEMEN: In the case of the application of Christopher C. Miller and others for patent on the Mountain City Lode, and the counter application of Tierney and others for sending it to the local courts for the adjustment of their adverse claim, this office decides, that the case having been once suspended and carried to the courts for such adjudication on the application of said Tierney & Co., and having been there dismissed for want of attention and prosecution on the part of said adverse claimants, can not be stayed a second

time for such purpose, but must now proceed upon the application for patent. The adverse claimants, having enjoyed the privileges accorded them by the statute, and having had their day in court, have but themselves to blame for whatever of inconvenience may result from their neglect to attend to their own interests.

It is not shown that they labored under any disability to prosecute on account of being in the quiet and peaceable possession of the property claimed; for, in the first place, there is no satisfactory evidence that the Mountain City and Tierney lodes are identical; and, in the second place, if they were identical, there is abundant evidence that Miller and others occupy and have occupied a portion of it; have made a location of it under the mining laws of Colorado, sunk shafts and performed other work upon it; and if these acts of ownership and possession do not lay a foundation for ejectment, it is difficult to tell what would.

Even if an ejectment had been impracticable, which it was not, there could have been no difficulty in proceeding in equity, either by a bill to quiet title, or an injunction to restrain Miller & Co. from applying for and obtaining a patent from the United States, or, in the event of their obtaining one, constituting them trustees of the same for the benefit of the rightful owners of the claim, or possessory title, under the laws of Colorado, inasmuch as the mining act requires the patent to be issued only to parties having previously occupied and improved the claims according to the mining regulations in force in the respective districts. The pretense of want of power to prosecute is, therefore, gratuitous, and to send the case into the courts a second time would be, under the circumstances, trifling with the provisions of the mining act. * * *

Very respectfully, etc.,

JOS. S. WILSON, *Commissioner.*

No. 44. Adverse claims may be filed up to last day of publication of notice in a weekly newspaper.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 29, 1879.

Register and Receiver, Leadville, Colorado.

GENTLEMEN: I am in receipt of Register's letter of the

fifteenth ultimo, asking within what period an adverse claim may be filed against an application for mineral patent which is published in a weekly newspaper.

By decision of the Hon. Secretary of the Interior, ten (10) insertions in a weekly newspaper are essential to comply with the law requiring sixty days publication. In such publication, the tenth, or last, issue falls upon the sixty-third day after the first, which is excluded. The statute contemplates that adverse claims may be presented during the legal period of publication. If the legal period does not extend to and embrace the last day upon which the publication (which is held to be necessary) is made, then the insertion of said notice in the tenth consecutive issue of such weekly is not only rendered unnecessary, but would appear to be an absurd requirement.

Adverse claim filed.

The last, or tenth, insertion being essential, it follows that adverse claims may be filed until the expiration of the day upon which the last issue of such weekly publication is made. Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 45. DOLLY VARDEN MINE.

1. District land officers are not expected or required to transact business out of office hours or on Sunday.

2. There is no law of the United States, or of the State of Nevada, prohibiting them from so doing.

3. An adverse claim presented to the receiver and received by him on Sunday, the last day of publication, was filed within the legal period, and entitles the adverse claimant to a stay of proceedings.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 17, 1879.

SIR: I have considered the appeal of George A. Sayer and Samuel Goldstone, from your decision of March 30, 1878, rejecting the adverse claim of the appellants to the application of the Hoosac Consolidated Gold and Silver Mining Company for a patent for one thousand five hundred linear feet of the Dolly Varden Mine, Secret Canyon mining district, Eureka, Nev., for the reason that said adverse claim was not filed within the time required by law.

You held that "officers are not expected nor required to transact official business after office hours, nor to leave their offices open for the transaction of business on Sun-

day;" and as "this adverse claim can only be considered as filed on Monday, the seventeenth of September, 1877, it must be rejected."

From the statement of facts presented in this case, it appears that the sixtieth day of publication of notice of the application fell on Sunday, September 16, 1877; that about 10 P.M. of the previous day, Mr. Sayer presented his adverse claim and tendered fees for the filing of the same to the register of the land office, who refused to receive said adverse claim or the fees for filing the same; that on the following day Mr. Sayer presented the adverse claim to the receiver of said land office, who accepted it, filed it, and received the fees for the same.

While it is true that officers are not expected nor required to transact business out of office hours, or on Sunday, still there is no law of the United States prohibiting them from doing such business, nor am I able to find any law of the State of Nevada which prohibits the transaction of ordinary business on the Sabbath day.

Both of said officers might properly have refused to receive such application either out of office hours or on the Sabbath day, but the receiver did receive the adverse claim, and filed the same, and by so doing, if suit was commenced within the time prescribed by law, I am of the opinion that the rights of the appellants were protected.

Your decision is therefore reversed, and the papers transmitted with your letter of May 8, 1879, are herewith returned.

Very respectfully,

C. SCHURZ.

The Commissioner of the General Land Office.

No. 46. 1. A *town site* is an adverse claim.

2. The party who sets up the adverse claim should commence the suit, except in cases where the adverse claimant is in possession of the premises.

DEPARTMENT OF JUSTICE,
OFFICE OF ASSISTANT ATTORNEY-GENERAL,
WASHINGTON, D. C., August 7, 1871.

SIR: I have considered the case of Theodore H. Becker v. Citizens of Central City, Colorado.

Becker claims under the act of July 26, 1866 (14 Stat. 251), three thousand linear feet of the mineral deposit

near Central City, Colorado, known as the Gunnel Extension or White lode.

He alleges that he has fully complied with all the provisions of the act and the rules of the General Land Office under it. His claim, however, is opposed by certain citizens of Central City, Colorado, who before the expiration of the ninety days provided in the third section, filed with the Commissioner of the General Land Office a remonstrance protesting against the issuing of the patent, representing that said Gunnell Extension or White lode, as claimed by Becker, extended to a considerable distance under town lots and improvements owned and occupied by them in said city.

The Commissioner, in a letter to the Register and Receiver, May 6, 1870, said: "Although such protests do not, in the opinion of the Commissioner, constitute such an adverse claim as would properly come within the purview of the sixth section of the mining act, yet in view of the magnitude of the interests represented to be involved, it is deemed but fair to have the rights of *all* the parties determined by the local tribunals, and you will accordingly notify *all* parties claiming adversely to said application of Becker that they will be allowed sixty (60) days from the date of your notification, in which to institute proceedings in court to adjudicate their respective rights in the premises."

This apparently plain decision was, it seems, misunderstood by the petitioners, who were in doubt whether the duty of commencing proceedings in the courts devolved under it upon them or the claimant. December 12, 1870, the Commissioner further instructed the Register and Receiver that it was the duty of the *town lot claimants* to commence such proceedings. From the decision of the Commissioner the town claimants have appealed.

The case presents two questions for consideration:

1. Is the claim of the petitioners an adverse claim, within the meaning of the sixth section?

2. Who must commence the proceedings in the local courts?

First. The second section provides that any person or association claiming a vein or lode of quartz or other ore rock in place bearing gold, etc., and who has previously oc-

cupied and improved the same in accordance with the local customs of miners, and expended thereon not less than one thousand dollars in labor and improvements, "and in regard to whose possession there is no controversy or opposing claim," may "file a diagram of the same, so extended laterally or otherwise as to conform to local laws," and "enter such tract and receive a patent therefor granting such mine," etc.

The privilege is here given of entering certain premises or "tract," as it is called, provided all the conditions stated have been complied with, and it is a "tract," in "regard to whose possession there is no controversy or opposing claim."

Possession is one of the elements of title, and is made by this statute a necessary subject of inquiry. If found to be in any one other than the claimant, it is a bar to the issuing of a patent, at least until adjudged wrongful in the manner pointed out in the sixth section.

There can be no question about this, if the possession relates to the vein or lode, the mine itself; but it is said that it is otherwise if it relates to the surface of the land.

Adverse claim.

In the present case, the application for a patent includes the surface and soil as well as the mineral. I am of opinion that the persons in possession of this surface are adverse claimants, and have an adverse claim within the meaning of this law, and are entitled to be heard in the local courts, before a patent is issued.*

Second. Who should commence the proceedings?

The sixth section reads as follows: "That whenever any adverse claimants to any mine located and claimed as afore-

* The acts giving the right to mine upon land appropriated for grazing and agricultural purposes, do not apply to the case of a town lot occupied for hotel purposes. Lands settled in good faith, and built up as mining towns, must be protected as incidental to the business of mining. Fitzgerald v. Urton, 5 Cal. 308.

The occupant of mineral land may rely upon his possession against a mere trespasser, unless he uses the land for grazing or agricultural purposes. Id.

In permitting persons to go upon public lands occupied by others for the purpose of mining, the Legislature has legalized what would otherwise have been a trespass, and the act can not be extended by implication, to a class of cases not specially provided for. Id.

said, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases."

Who shall commence suit.

As a general rule the suit should be commenced by the party who sets up the adverse claim. I think this rule should apply to all cases, except those in which the adverse claimant is in the evident and open possession of the premises, tract, lode, or vein, or a portion of the same. When thus in possession, an adverse claimant who attacks his right to possession should certainly be required to take the initiative. To hold otherwise would be against all the analogies of the law.

In the case now under consideration, the adverse claimants are in the evident and open possession of the surface of the ground or a portion thereof, and under the rule as above stated should be made defendants to the proceedings which Becker should be required to bring against them.

I advise a reversal of the decision of the Commissioner, and that sixty days be given to Becker after the receipt of notice within which to commence proceedings against the parties in possession.

Very respectfully,

W. H. SMITH, *Assistant Attorney-General.*

HON. C. DELANO, *Secretary of the Interior.*

Concurred in August 9, 1871, by B. R. Cowen, Acting Secretary.

No. 47. In case of judgment against applicant for a portion of his claim, he may proceed to secure title to remainder on showing the requisite amount of expenditure in labor and improvements thereon, if in other respects according to law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 27, 1872.

Register and Receiver, Central City, Colorado Territory.

GENTLEMEN: * * * This office holds, therefore, that

the foregoing verdict and judgment are fatal to the application of Bradley et al., to the extent of five hundred feet of the premises claimed by them as *Rhode Island Lode*, leaving, however, two hundred and fifty feet of the claim uncontested.

If the claimants have expended an amount equal to one thousand dollars upon this *uncontested part* in labor and improvements, and can in other respects come within the law, there is perceived no reason why they can not proceed and obtain title to the portion of their original claim not affected by said verdict and judgment, should they desire to do so. * * * Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner*.

No. 48. Proceedings necessary after determination of suit upon the adverse claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Oct. 30, 1873.

H. B. MORSE, Esq., *Central City, Colorado*.

SIR: In reply to your letter of the eighteenth instant, I have to state that the records of the local land office at Central City, Colorado, will show the present status of the application of Jacob Tascher for patent for the Alger lode.

On the fourth March, 1872, the Register and Receiver were directed to suspend proceedings in the case, awaiting the final determination of a suit commenced by Mr. Mallon, upon an adverse claim, asserted by him against said application for patent.

If, as you state, the suit commenced against the applicant for patent has been decided in favor of the applicant, a copy of the decree of the court in the case should be filed with the Register and Receiver, and a certificate of the clerk of the court that no suit is pending against said applicant brought by the adverse claimant, bringing into question the title to said property.

Upon the filing of these papers with the Register and Receiver, they will allow the entry to be made.

Very respectfully, your obedient servant,

WILLIS DRUMMOND, *Commissioner*.

No. 49. Adverse claim sworn to before an officer out of the land district, but whose jurisdiction extended into the land district, and who acted within his jurisdiction, allowed.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., February 17, 1877.

SIR: I have considered the case of the Corning Tunnel, Mining, and Reduction Company v. Wm. G. Pell, Samuel Cochran, and John W. Nicholson, applicants for patent for fifteen hundred linear feet of the Slide lode, Gold Hill mining district, Boulder county, Central City, Colorado land district, on appeal from your decision of November 3, 1876, adverse to the Corning Company.

The facts of this case are as follows, to wit: On November 24, 1875, W. G. Pell, Samuel Cochran, and John W. Nicholson filed an application in the local land office for a patent for fifteen hundred linear feet of the Slide lode, Gold Hill mining district. Sixty days' notice, by publication in the Weekly Sunshine Courier, from December 4, 1875, to and including February 12, 1876, was also made, and the plat and notice were properly posted on the claim and in the register's office.

A duly certified abstract of title from the records of Boulder county shows that said lode was discovered July 26, located July 30, and recorded July 31, 1875. Applicants also show a compliance with the law, and have record title of said location. The Corning Tunnel, Mining, and Reduction Company, by F. A. Squires, president, filed an adverse claim against said application January 20, 1876, and commenced suit by ejectment to determine the right of possession of the tract in question in the district court of Boulder county on February 7, 1876.

Mr. Squires alleges that the Slide lode is within the location of the tunnel site of the company which he represents; that said Slide lode was discovered after the tunnel site, and is a blind lode; that said tunnel site was located in conformity with the mining act of May 10, 1872; that said company have expended a large amount of money; and that their rights are prior and superior to those of the applicants. A copy of the location notice shows that George C. Corning, A. J. Mackey, James A. Carr, and Daniel A. Robinson lo-

cated and recorded said tunnel site September 18, 1872. They made a second location of the same July 9, 1873, wherein the tunnel is described as seven feet high, six feet wide, and one hundred and thirty feet in length.

Said company have record title to said tunnel site and location. One of your reasons for rejecting the adverse claim is that said claim was not sworn to within the land district where the mining claims are located. The facts relative to this matter are that the adverse claim was sworn to before A. J. Mackey, deputy-clerk of the district court in and for Boulder county, and although there is no testimony showing the exact *part* of the county where the oath was administered, it is shown that the office and residence of said clerk were in the town of Boulder, in said county, and it is probable the affidavit was made at that place. Now the line between the Central City land district and the Denver land district runs through Boulder county, leaving the *locus* of the town of Boulder in the Denver district, and the mining claims in the Central City district. Section two thousand three hundred and thirty-five of the Revised Statutes of the United States provides that "all affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths *within* the land district where the claims may be situated." I am of the opinion that under this statute an officer authorized to administer oaths *within* the land district may administer the same *without* the district, but within the jurisdiction. I do not think the cases referred to in your decision are in point, for the reason that there is a manifest difference between the acts of the Commissioner, who has authority only to administer oaths *in* California for Nevada (as in The Dardanelles Mining Company v. The California Mining Company case, Copp's Mining Decisions, p. 161), and the acts of an officer *in* the State, exercised *within* his *jurisdiction*, where that jurisdiction extends *within* the land district where the claims are located.

Decision.

Where suit is brought by the adverse claimant, under the seventh section of the act of May 10, 1872, within the time required by law, it is only necessary to pass upon the

regularity of the adverse claim, leaving the rights of the parties to be determined by the court.

Your decision is reversed, and the case remanded to your office, to await the judgment and decree of the court before which suit is pending.

The papers transmitted, with your letter of February 12, 1877, are herewith returned.

Very respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

No. 50. Exception inserted in patents under acts of 1866 and 1870, in regard to *liens.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 19, 1871.

Register and Receiver, Central City, Colorado.

GENTLEMEN: On the ninth day of February, 1870, the Franklin Silver Mining Company of Colorado, by their agent, A. Blackman, filed in your office an application for a patent for eight hundred feet in length, by fifty feet in width, on the Franklin lode, a silver and gold-bearing vein of rock in place, and situated in Idaho mining district, Clear Creek county, Colorado.

* * * The adverse claimants do not claim identity of Franklin with the Miner's Friend, or with the Williams lode, but the nature of their objections seems to be:

First. An alleged interference with surface ground pertaining to the latter lodes according to local usages, claiming that the Franklin lode, or Crevice, is not in the center of the ground finally surveyed for them under their said application; and,

Second. That the patent should not issue to said company by reason of a lien they have upon a portion of the lode.

With reference to the first of these objections, it is proper to state that, upon a critical inspection of the plat of said final survey of the Franklin lode, the surface ground, fifty feet in width for the convenient working of the mine, as fixed by the law of Colorado Territory, is shown to embrace the shafts and buildings pertaining to said Franklin lode, the

discovery shaft on said lode being represented as occupying a central position between the side boundary lines of the survey; and inasmuch as the Franklin lode was the prior discovery, and as said surveyed surface ground is neither shown, nor claimed to include any buildings or other improvements not pertaining to the Franklin lode, it is not perceived how in justice the very parties who originally located and sold the claim, can now appear against their successors in interest to prevent them from having the benefit of the mining statutes of Congress, and this office therefore declines to suspend the application on account of this objection.

At the same time it is proper to state that neither these adverse claimants, nor any other parties, need be under any apprehensions that said company will take by their patent any other lode than the Franklin, upon which the required amount has been expended in labor and improvements, all other lodes or veins being "expressly excepted and excluded" from the conveyance, that being a general condition inserted in all mining patents.

Exception.

With regard to the question of the lien claimed by the said adverse parties upon a portion of the property, it will be perceived by a reference to the thirteenth section of the Amendatory Mining Act of ninth July, 1870 (which constitutes a part of the original mining enactments), that a proviso is contained therein, "That nothing in this act shall be deemed to impair any lien, which may have attached in any way whatever to any mining claim or property—thereto attached prior to the issuance of a patent."

If, therefore, as alleged, the parties opposing this application have such lien upon the premises, or any portion thereof, they are fully protected by the law of Congress itself, and after the patent shall have been issued to the applicants, thus quieting the title, the parties claiming such lien will be in a much better condition to enforce it than if the question of titles was undermined.

* * * * * * *

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 51. 1. A foreign corporation succeeds to all the rights of the patentees.

2. Where a patent issued erroneously describing the premises claimed and subsequent application is made by other persons for same tract, the patentees, or their successors in interest, are entitled to file adverse claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 8, 1875.

Register and Receiver, Central City, Colorado.

GENTLEMEN: This office is in receipt of a letter from William W. Ramage, Esq., agent and manager for the assignees of J. W. Haseltine et al., patentees of the Searle Lode, wherein he states that you refused to allow him to file a plea against the application of Joshua S. Reynolds, for patent for the Aduddell Lode, on the ground that said assignees were a foreign corporation.

Foreign corporation claiming under patent.

To prevent misunderstanding on this important question, I have to call your attention to section 2326 of the Revised Statutes, wherein the following language is used: "Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever." A foreign corporation purchasing a patent issued to citizens of the United States, takes all the rights and is entitled to all the privileges that would have accrued to the original patentees, had they retained their interest in the mine. You will therefore treat the agent of such foreign corporation precisely as you would the patentee, so far as rights are concerned under the United States patent.

Ordinarily, a few words of explanation will convince the holder under a patent, that a plea or adverse claim is unnecessary where a survey for another lode crosses his own premises, as the ground in conflict is already patented to him, and will be excepted from the patent issued under the subsequent application. Should the patentee persist in filing an adverse claim, you will receive it, and give him the usual notice in writing that the same is rejected on the grounds above recited, when he may appeal to this office if he desires to do so.

Erroneous patent.

But this is not an ordinary case. From the letters of Mr. Ramage, it appears that the premises conveyed by the patent to the Searle Lode are incorrectly described therein; that the land conveyed lies considerably east of that claimed by his assignors. It becomes his duty, therefore, to protest against the issuance of a patent on a conflicting survey until a second patent is issued for the Searle Lode, correctly describing the claim. You are therefore directed to receive such plea or protest as Mr. Ramage may desire to file in the Aduddell application, and transmit the same to this office, with the other papers in the case, after the entry has been perfected as usual.

Mr. Ramage has been furnished with a copy of this letter.

Very respectfully,

S. S. BURDETT, *Commissioner.*

No. 52. Entry allowed, pending litigation in the courts, canceled.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Oct. 23, 1873.

Register and Receiver, Central City, Colorado.

GENTLEMEN: It appears from your letter of the twenty-third of July last, that on the sixth of November, 1872, D. E. Dulaney filed with you an application for patent for six hundred and seventy-five feet of the Hidden Treasure Lode, Griffith Mining District, Clear Creek county, Colorado.

On the thirteenth of December, 1872, L. D. C. Gaskill et al. filed with you an application for patent for nine hundred linear feet of the Saco lode, situated in the same district.

On the fourth of January, 1873, L. D. C. Gaskill et al., the applicants for patent for the Saco lode, filed with you an adverse claim against the application of Mr. Dulaney, for patent for the Hidden Treasure lode, alleging a conflict between the said applications for patent.

The applicants for patent for the Saco lode commenced suit against the applicant for patent for the Hidden Treasure lode within the prescribed time after said adverse claim was filed, and said suit was still pending and undetermined.

The premises described in said applications for patent

being in litigation, a suit having been instituted upon an adverse claim filed by one applicant against the other, no entry should have been permitted by either party, until a final decree of the court had been rendered in the matter.

The entry of the Saco lode, made March 3, 1873, has this day been canceled.

You will inform all parties in interest, and acknowledge the receipt hereof.

Very respectfully, your obedient servant,

WILLIS DRUMMOND, *Commissioner.*

No. 53. Proceeding upon adverse claims, where republication of notice of application for patent is necessary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 29, 1880.

Register and Receiver, Leadville, Colorado.

GENTLEMEN: In reply to Register's letter of thirteenth instant, you are advised that:

Adverse claim should be again filed during second publication.

When for any reason the publication of notice of application for patent to mineral claims is defective, and republication is made, the adverse claims which were filed during the first publication should be again filed within the second publication, and no fees for such second filing should be exacted. The adverse claimants should be promptly notified when the first publication is found defective and ceases, and the same papers constituting their original adverse claim, with any necessary corrections, to specify the particular proceeding to which they relate, would be sufficient.

Certificate that suit had been commenced will operate as a stay of proceedings.

Should the adverse claimant have commenced suit under his first filing, the certificate of the clerk of court, under seal, to that effect, furnished when the last filing of adverse claim is made, as aforesaid, or within thirty days thereafter, will be considered as authority for the stay of proceedings contemplated in second 2326 United States Revised Statutes.

No fee upon filing of protest.

There is no legal fee for *protests* filed after the expiration

of publication, or within such period. The party filing a protest, not intended to be followed by suit, or which is filed after the period of publication, is not regarded or treated as a party in interest, and is not entitled to the right of appeal—he is merely *amicus curiæ*, and seeks to suggest some failure on the part of the claimant to comply with the law, or some defect in the record, of which the government should take notice.

You should always receive such protests, but are not required to give the party filing them any time for appeal or argument. If they suggest any defect, of course you will require it to be remedied before allowing entry, in the same manner as if you had discovered the defect without the suggestion in the protest.

In all cases such protests must accompany the record to this office.

Adverse claims filed subsequent to expiration of the period of publication can be considered only as protests, and should be received as such, without fees.

No fees must be charged or received for anything but the adverse claim, filed and acted upon as such.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

CHAPTER VI.

PROTEST.

No. 1. Separate and distinct protests to be filed against each application for patent.
No. 2. Protest not recognized when only *surface* conflict is alleged.
No. 3. *a.* When suit is not commenced within the statutory period the adverse claim is treated as a protest only.
b. Protestant not entitled to the right of appeal.
No. 4. Location made by "Miners Relief and Territorial Poor Fund," void *ab initio.*
No. 5. *a.* Adverse claim not properly sworn to, treated as a protest only.
b. Must be ten insertions in a weekly newspaper.
No. 6. A commissioner of deeds for Nevada residing in California not an officer before whom an adverse claimant for a mine in Nevada may make oath of his claim.
No. 7. McGarrahan v. Cerro Bonito Quicksilver Mine.
No. 8. Protestant not entitled to right of appeal.
No. 9. Bill in equity to restrain defendants from applying for patent.
A protest is a challenge of the applicant's own showing, and through it no trial of unascertained rights is authorized. See No. 6. Adverse.
In absence of protest the substitution of valid for defective affidavits allowed. See No. 12. Application for patent.
Adjoining claimants have no right to protest against survey. See No. 5. Survey.

No. 1. Parties who desire to have their protests considered must file separate and distinct charges against each application for patent.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 9, 1873.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: This office has examined the papers in case of the application of Norris W. Mundy and Joseph R. Walker, for patent for the Mountain Tiger lode; the application of J. R. Walker, for patent for the Zella lode; the application for patent for the Rockwell lode, made by J. R. Walker.

Two of said applications for patents were filed in your office on the fifth of March, 1873, to wit, for the Mountain Tiger lode, and the Rockwell lode.

The application for patent for the Zella lode was filed in your office on the eleventh of March, 1873. The applicants

for patent have shown a strict compliance with the law and instructions in each case.

On the third of May, 1873, a protest was filed in your office against said applications for patents, which protest is sworn to by Thomas Davis, as attorney for William W. Daly, Charles Gippert, H. S. Haines, and Edward Bell; attached to said protest is a diagram made by Thomas Davis, who, it appears, is not only attorney for said protestants, but also deputy mineral surveyor. This protest is informal, and insufficient to warrant this office in suspending proceedings upon said applications, and for the following reasons:

Separate protests against each application for patent.

It is contrary to the spirit and letter of the law and the practice of this office to permit one person, or association of persons, to file one protest against several applications for patents for separate and distinct lodes. In the cases under consideration, there were three separate and distinct applications for patents for three separate and distinct lodes. Each application is an entirety, and rests upon its own merits.

As each application for patent under the mining act is for a separate and distinct portion of mineral land, parties who desire their adverse claims considered must file a separate and distinct adverse claim against each application separately.

Adverse claimants who desire to have their adverse claims considered, must strictly comply with the law and instructions, and file with the local land officers, within the time prescribed by law and in proper form, a separate and distinct adverse claim against each application which it is alleged conflicts with the premises owned by such adverse claimants.

Where applicants for patents strictly comply with the law and instructions, the adverse claimants will also be required to strictly conform to the instructions of this office and the laws of Congress.

In the cases under consideration, it is not clear how the protestants could in any way be injured, or their rights prejudiced, by the issuance of patents as applied for; as the New Era location is of much later date than that of either

the Zella, Rockwell, or Mountain Tiger mines, the mining act of May 10, 1872, sec. 14, providing what the respective rights of the parties shall be where "two or more veins intersect or cross each other." * * * *

Very respectfully,

W. W. CURTIS, *Acting Commissioner.*

No. 2. The Land Department will not entertain a protest where only *surface conflict* is alleged.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, January 7, 1870.

Register and Receiver, U. S. Land Office, Sacramento, Cal.

GENTLEMEN: A number of communications have been received at this office from Williams & Co., objecting to a patent being issued to the Pittsburg Company on the Mt. Joy Lode, on the ground of an alleged conflict between the claims of these companies.

In their protest filed with the Surveyor-general on the twentieth March last, Williams & Co. object: 1. Because the Pittsburg Company's survey does not correctly designate the course of the lode, the former alleging its bearing to be N. 71° E. or thereabouts. 2. That the final survey of the Pittsburg Company differs from the preliminary one, and from their notice of application for patent, in this: that in the final survey the last course is N. 25½° W., instead of N. 19° W., as in the preliminary and notice.

They contend that the lode should be cut at right angles with its general course, and that a line bearing N. 19° W. will thus cut it. They were informed that the line is in fact the same in both surveys, the only discrepancy consisting in an erroneous bearing having been given to it in the preliminary proceedings, and they now appear to have abandoned the objection as originally made, and insist that the real conflict is not on the surface, but "under ground." In their last communication to their attorney in this city they even appear to adopt the bearing of N. 25½° W. as designating the true boundary between themselves and that company, but complain that the Pittsburg Company, in working down in their vein, do not observe this line; that they treat it as having relation merely to their surface-ground, and that they have, as a matter of fact, followed the ledge "under ground" far beyond this line.

The ledge or vein, it seems, dips at an angle of 40° or 45°, and as the boundary line between the companies on the surface does not cut the ledge at right angles with its course, but makes a smaller angle on the side of the Pittsburg Company's claim, that company, in descending into the lode, will necessarily get beyond the line, unless they continually vary from what would be a perpendicular if the vein occupied a vertical position, and this it appears is what Williams & Co. contend the Pittsburg Company is obliged to do.

It should be remembered, however, that no patent has yet been issued to this company, and if they are now following the ledge in its downward progress far beyond the line bounding their surface ground, it is not by virtue of any grant emanating from this office, but under the authority conferred by the local mining regulations; and if their rights in that respect are such that Williams & Co. can not restrain them now, when they are without patent, it is not easy to perceive what injury they will receive from the issuing of the patent, as that document will not confer any greater rights as to the manner of working the mine than are already possessed under the local rules and customs of miners.

No controversy exists in respect to the number of feet claimed on the lode, one company claiming 2,000 feet and the other 1,000, and both agree as to the partition post dividing one claim from the other. Nor is there any real conflict as to the surface ground, both claimants adopting the same identical line as a boundary between them in the diagrams filed with their respective applications for patents, one designating its bearing as N. 19° W.; the other as N. 25½° W., but both marking its termini by the same identical posts.

It is in fact, as Williams & Co. represent it, an "underground" conflict, and one that can not be corrected by a modification of the lines on the surface. Evidently such a conflict can not be adjudicated in court under the sixth section of the mining act, for the controversy there contemplated is one in which the judicial decision would control the General Land Office in its subsequent action on the application for patent, and would lead to a modification

of the grant one way or the other, so as to conform it to the decision of the court. But no such result could follow from the action of the court upon the question raised by Williams & Co., because whatever might be determined there, the patent issued from this office would still grant "*the right to follow the vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining,*" the mining act authorizing the grant to be made in this form, and no decision of a legal tribunal can nullify this statutory requirement. Most assuredly a decision producing no change in the description of the premises or the parties, can in no way control the grant contained in a patent, for all its other formal parts are statutory and beyond the power of the courts.

An applicant for a patent under the mining act may include surface groud lying on either or both sides of the vein, as part of his claim, or he may apply for a patent for the vein alone. His rights upon the vein and in working into it are precisely the same, whatever may be the form of his surface ground, or whether he has any or none. His end lines and the distance between them will be the same at all depths as upon the surface, no matter whether the position of the vein is vertical, or whether it dips at a less or greater angle. This results directly from the right granted to the miner by all the local mining customs, as well as by the national mining act, of following the vein with all its dips, angles, and variations; and the Pittsburg Company and Williams & Co. alike possess this privilege by the mining regulations of Nevada county, California.

The Congressional enactment adopts in this respect the provisions of the mining customs, subordinating the rights of a patentee in respect to the surface ground, to the more important rights in respect to the vein, granting the right to follow the latter with all its dips, angles, and variations, to any depth, although it may enter the land adjoining, and requiring the adjoining land to be sold subject to this condition.

If the vein occupied by these companies descended vertically into the earth, no controversy would arise between them, it is presumed, in respect to the descending boundary between their claims. The line would be a per-

pendicular, and at a depth of one thousand feet the claimants would still measure from such perpendicular one thousand feet in one direction and two thousand in the other, as the extent of their respective claims, at the bottom of the cavity made by extracting the ore. If, then, we suppose such cavity to have been already made, and that, by a convulsion of nature, the vein should be swung from a vertical position to that of an angle at which it now dips, the cavity would then, in its last position, represent such a one as these contestants are now authorized to make, by extracting the ore from their respective portions to that depth, and the lines of such cavity would represent the lines they are now entitled to follow, either under the mining customs or the act of Congress.

If either party is guilty of trespass on the rights of the other, the courts are open to them for redress, either before or after the issuing of a patent, and such rights are neither abridged nor enlarged by the patent.

The Pittsburg Company's application having been so long suspended, on account of the filing of an opposing claim having in fact none of the incidents of an adverse claim, under the sixth section of the mining act, will be carried into patent without further delay.

You will notify both parties of this decision.

Very respectfully,

JOS. S. WILSON, *Commissioner.*

No. 3. 1. When first suit is dismissed, a second suit, commenced after the expiration of thirty days, will not operate as a bar to entry.

2. The adverse claim, under such circumstances, treated as a simple protest.

3. Protestant not entitled to the right of appeal.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., October 2, 1879.

SIR: Referring to your letter of August twentieth last, transmitting the papers in the case of the Boston Hydraulic Gold Mining Company v. The Eagle Copper and Silver Mining Company, from the Stockton, California, Land District, I have to state that an examination of the judgment roll in the suit commenced July 12, 1877, in the District Court for the Eleventh Judicial District of California, and removed to the United States Circuit Court August 22, 1877,

shows that said suit was, on motion of the plaintiff's attorney, dismissed January 7, 1879. Thus the suit provided for in section 2326 of the Revised Statutes, during the pending of which proceedings in your office were stayed, was terminated, and it then became your duty to proceed in the case in the manner determined by you in your decision of July 7, 1879.

Suit commenced after thirty days.

The suit commenced by plaintiff March 3, 1879, after an expiration of thirty days from the period of publication, can not be recognized by this department as a bar to the proceeding to obtain a patent by the defendant, The Eagle Copper and Silver Mining Company. (Morse v. Streeter et al., Copp's Min. Dec., p. 127; O. D. Lombard, Copp's Land Owner, vol. 3, p. 194; Schoellkopf et al., Id., vol. 4, p. 34.)

Treated as protest—Not entitled to appeal.

I am in receipt of an appeal from your decision of July 7, 1879, dated at Boston, Mass., on the fifteenth ultimo, and signed by the Boston Hydraulic Gold Mining Company, by A. K. P. Joy, attorney. In view of the fact that this company has not complied with the requirements of the mining statute, in commencing a suit which can be recognized as a bar to an application for patent, it can not be considered by this department as in the position of an adverse claimant, but as a protestant only; hence, it is not entitled to an appeal, and said appeal can not be recognized. (See the cases above cited, and also that of the Boston Quicksilver Mine, Copp's Land Owner, vol. 4, p. 34.)*

Mr. Joy was in error in assuming that he was entitled to sixty days, from the receipt of notice of your decision, in which to appeal to this department. Your action in transmitting the case was in accordance with existing instructions.

The papers in the case are herewith returned, and you will proceed in the usual manner with the application.

Very respectfully,

A. BELL, *Acting Secretary.*

To the Commissioner of the General Land Office.

* See Secretary's decision of September 27, 1877, in Sprucemont case.

No. 4. 1. A location made by the "Miners' Relief and Territorial Poor Fund," being neither a person nor an association of persons, is unauthorized and void *ab initio.*

2. No valid right by purchase can be acquired under such a location.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 7, 1871.

Register and Receiver, Central City, Colorado.

GENTLEMEN: With your letter of date the twenty-fourth of March last, were received the papers and your report in the matter of an application of William A. Hamill, for a patent for certain mining premises, called the Gunboat lode, situate in Clear Creek county, Colorado Territory.

* * * On the eleventh of August, 1870, Robert O. Old, agent and superintendent of the Colorado Terrible Lode Mining Company, filed in your office his sworn statement, protesting against the survey and entry of said premises claimed by Hamill, "for the reason that said premises are not the property of said William A. Hamill, and the said applicant is not entitled to hold the same under and by the local laws of said Griffith mining district, nor the laws of Colorado Territory; and because the said premises, or some portion thereof, are claimed adversely by the Colorado Terrible Lode Mining Company; and said premises, as described in said diagram, can not be entered without interfering with certain property owned by it, and described as follows: The west seven hundred feet of the Terrible lode, to wit: the west half of property for which United States patent issued to Fred. A. Clark and Henry Crow, on the eleventh day of December, 1869, and therefore make this adverse claim."

On the nineteenth day of November, 1870, the said claimant, William A. Hamill, relinquished "from said application for patent all claim for patent to said east seven hundred (700) feet of said Gunboat lode, under the above application, hereby expressly declaring my intention not to relinquish any rights I may have to the east seven hundred feet of said lode, under the provisions of the local laws."

* * * With reference to that portion of the affidavit of the agent of the Colorado Terrible Lode Mining Company, which alleges that the application of Hamill for pat-

ent for the westerly seven hundred feet of the Gunboat lode, "*commences on, covers, and is identical with* a part of the seven hundred feet of the Terrible lode, which was patented to Frederick A. Clark and Henry Crow, and by them deeded to said company," it is proper to state that an examination of the plat of the final survey, showing the relative positions of these claims, fails to substantiate this alleged interference further than to show that *post No.* 6, at the north-east corner of the Gunboat survey, is a few feet inside the westerly limits of the surface ground patented with said Terrible lode; but inasmuch as no patent will issue on this survey of the Gunboat lode without a special clause excepting from the conveyance any portion of the fourteen hundred feet of the Terrible lode and surface ground patented therewith, it is not perceived that this portion of said company's objections is entitled to further consideration.

The company's further objection appears to be, in effect, that Hamill's said application and survey covers one hundred feet of mining ground adjoining and immediately beyond the westerly end line of the said patented Terrible lode.

Their alleged possessory title to this disputed one hundred feet of ground appears to have originated in a location thereof, made and recorded on the thirteenth day of December, 1866, as Claim No. 1, West, on the Terrible lode, in the name of the "Miners' Relief and Territorial Poor Fund," which was sold on the twelfth of July, 1869, by the County Treasurer to Fred A. Clark and Henry Crow, who, on the eleventh of April, 1870, conveyed the same to said company.

Void location.

But on the thirteenth day of December, 1866, the date of this location, the Congressional Mining Law had been in force some months, and under it there was no authority for such location as this, inasmuch as the "Miners' Relief and Territorial Poor Fund" was neither a person nor an association of persons; was without legal existence, and powerless and incapacitated to "occupy and improve" a claim, or perform those acts of ownership or possession required of miners, as conditions essential to the holding of claims,

or of proceeding to make payment to the government and obtain patent.

This office, therefore, declines to give further consideration to the right of said company to oppose said application, ruling that the said location was void *ab initio*, and that they acquired nothing by their purchase thereof from Clark and Crow as aforesaid, those parties having no interest therein whatever to convey.

It likewise appears from the papers that the said "Colorado Terrible Lode Mining Company" is a corporation created and existing under the laws of England, and is therefore not a citizen of the United States, and not capable of asserting a claim to any portion of the public land of the United States, or of receiving from the government a title therefor in any event.

* * * * * * *

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 5. 1. Adverse claim not recognized because not sworn to before an officer authorized to administer oaths in the land district in which the claim is located. Treated as a protest.

2. A publication in a weekly newspaper for nine weeks is not a publication for sixty days. There must be ten insertions.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 30, 1874.

SIR: I have considered the appeal of John H. McMurdy et al., adverse claimants, from your decision of October 29, 1873, in the matter of the application of Eli S. Streeter and Thomas McCunniff for patent to six hundred linear feet of the Bell Wether lode, Central City land district, Colorado.

Adverse claim dismissed.

You dismissed the adverse claim of McMurdy et al., on the ground that the protest filed was not sworn to before an officer authorized to administer oaths in the land district where the claim is situated, following herein the rule laid down in the recent case of the Dardanelles Mining Company v. The California Silver Mining Company, decided by the department October 28, 1873. Your decision is to this extent correct, and is hereby affirmed.

It is asserted, however, upon appeal, that the claimants have not complied with the requirements of the act of June

10, 1872, in the prosecution of their claim, and that, notwithstanding their (contestants') default, they are entitled to show such non-compliance, and thereby defeat the claim of the applicants for a patent under the present proceedings.

The right here contended for is expressly given by the last clause to the sixth section of the act of June 10, 1872 (under which act all the proceedings in this case were instituted), which is in the following words, viz.: "And thereafter no objection from third parties to the issuance of a patent shall be heard *except it be shown that the applicant has failed to comply with this act.*" The contestants are therefore to be considered as parties to the contest for the purpose of showing from the record that the claimants have not complied with the requirements of the act.

For the purposes of this case it is only necessary to notice one of the objections raised by the appellants, viz., that the publication of the notice of application was not made in compliance with the terms of the act.

Publication.

The publication was made in a weekly paper, The Colorado Miner, for nine successive weeks, nine insertions, the first being in the issue dated February 6, 1873, and the last in the issue dated April 3, 1873. Was this a publication "for the period of sixty days"? I think not. The language of the act is plain: "The Register of the Land Office * * * * shall publish a notice that such application has been made *for the period of sixty days* in a newspaper to be by him designated," etc. It does not direct a publication once a week for eight weeks or two months, but for a certain period, viz., sixty days. The publication may undoubtedly be made in a paper published weekly, but it must cover the full period named. The time elapsing between the first and the last insertions must include the full period of sixty days. From the sixth of February, 1873, to the third of April, 1873, including the first day of publication (which I think should be excluded), there were only fifty-seven days, viz., in February, twenty-three; in March, thirty-one; and in April, three; total, fifty-seven. This was clearly not a publication "for the period of sixty days."

The statute having in this material requirement been disregarded, the publication as made, and all subsequent proceedings founded upon it, were irregular and invalid. I, therefore, reverse your decision so far as it affirms the regularity and validity of these proceedings, and direct that the papers be returned to the local office for publication of the notice of application in compliance with the requirements of the act.

The papers transmitted with your letter of January 20 and February 4, 1874, are herewith returned.

Very respectfully,

C. DELANO, *Secretary.*

Hon. W. DRUMMOND, *Commissioner, General Land Office.*

No. 6. A Commissioner of Deeds for Nevada, residing in California, is not an officer before whom an adverse claimant to a mine in Nevada may make oath to his claim.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., October 28, 1873.

SIR: I have considered the case of The Dardanelles Mining Company v. The California Mining Company, on appeal from your decision of March 1, 1873.

On the twenty-second October, 1872, the Dardanelles Mining Company filed, in the local office at Carson City, Nevada, an application for patent for twelve hundred linear feet of the Bosphorus lode, Gold Hill, Nevada, with surface ground four hundred feet in width.

Before the expiration of the sixty days publication required by law, the California Silver Mining Company filed a protest, which was verified by oath of its president, before a commissioner of deeds for the State of Nevada, in the city and county of San Francisco, California.

The Dardanelles Mining Company, before the local officers, moved to dismiss the protest, on the ground that it was not made in conformity to the act of May 10, 1872 (seven record, thirteenth section), which provides that affidavits in all matters arising under this act may be verified before "any officer authorized to administer oaths within the land district where the claims may be situated."

Not authorized to administer oaths in the land district.

The local officers referred the question to your office for

instructions, and March 7, 1873, you held that the protest should have been verified before an officer authorized to administer oaths in the Carson City land district, and that the verification before a commissioner of deeds for Nevada in California was not in compliance with the act. You accordingly granted the motion and dismissed the protest.

Your construction of the act in this particular is, in my opinion, the correct one, and I affirm your decision.

The instructions issued under the act of July 26, 1866, required all affidavits to be made before the register or receiver.

The acts of July 9, 1870, and May 10, 1872, authorize them to be made before any officer within the land district who has authority to administer an oath.

This was done, doubtless, for the convenience of applicants, and the authority was limited to the land district, so as to make it practicable to punish those who might be guilty of perjury in making the oath.

The papers transmitted with your letter of July 22, 1873, are herewith returned.

Very respectfully,

B. R. COWEN, *Acting Secretary.*

Hon. WILLIS DRUMMOND, *Commiss'r, General Land Office.*

No. 7. McGarrahan v. The Cerro Bonito Quicksilver Mine.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., March 10, 1877.

SIR: I have considered the questions presented by William McGarrahan, Esq., in connection with the applications for patents for certain mining claims, known as the Cerro Bonito Quicksilver Mines, numbered one to eight inclusive.

It is claimed that McGarrahan is the grantee of the Panoche Grande Rancho—that the mines in question are located within the exterior limits of said grant, and that all the lands within said limits are reserved from appropriation until a final adjudication of the case.

It would indeed be presumptuous to attempt to express an opinion on the merits of a question that has been such a fruitful subject of controversy in the judicial, legislative,

and executive departments of the government, but I think the duty of this department is clearly indicated.

After a full consideration of the case, upon its merits, the United States Supreme Court, at the December term in 1865, rejected the claim of Gomez, the grantor of McGarrahan, to the Panoche Grande Rancho. (3 Wall. 752; 9 Id. 298.)

This decision has not been reversed by judicial authority, or remedied by legislative enactment; it therefore must govern this department in its action.

It is also claimed that a case is now pending in the Supreme Court involving the lands in question. But on this point I can not agree with Mr. McGarrahan. In said case he relies upon a certain alleged patent to sustain his title to a certain described tract of land, and the mines in question are confessedly not within the limits of said tract, hence the determination of the suit can in no way affect the same.

The decision of the court in December, 1865, being considered a final rejection of the grant, and as binding upon this department, the lands, if admitted to be within the claimed limits of the grant (on which point, however, I decline to express an opinion), must be considered as public lands, and if not within said limits, Mr. McGarrahan asserts no claim to the same.

I do not desire at this time to express any opinion in regard to the right of Mr. McGarrahan to purchase lands under the provisions of the seventh section of the act of July 23, 1866. But I do not think it will be contended that it is the duty of this Department to withhold from entry lands considered as "public" for an indefinite period of time, awaiting the application of a Mexican grantee to purchase the same, even if the lands in question, in view of their mineral character, were considered as subject to such purchase.

The application of Mr. McGarrahan to purchase certain lands (viz., the tract surveyed by E. H. Dyer, in July, 1862, containing 17,768 77–100 acres, and designated on the plat of survey as lot No. 37), under the provisions of said act, now on file in this department, does not include the tracts in question, and therefore should not operate as a bar to the applications now pending.

Believing these views to be correct, I can not regard Mr. McGarrahan in any other light than as a protestant in the eye of the law, and, as such, he has no right to appeal from your decision, as held in my decision of March 24, 1876, in the Boston case, and in the case of the Mt. Pleasant Mine, decided on the 17th ultimo.

From an examination of the papers in the cases before me, it appears that the applicant in each case filed a notice of his claim with the Recorder of the Cerro Bonito Mining District, and afterwards filed an application with the Register of the local land office for a patent, in due form, together with a plat and field notes of the claim, made under the direction of the United States Surveyor-general; that said plat, or a copy, with a notice of application for a patent, was duly posted on said claim; that the notice was published for a period of sixty days, as required. It also appears that the claimant, at the time of filing his application, filed with the Register a certificate of the Surveyor-general, showing that five hundred dollars' worth of labor had been expended on the mining claim.

The applicants appear to have complied with the requirements of the statute. There are no adverse claims. The evidence of such compliance is *ex parte*, and in some minor particulars it is defective.

The affidavits, showing the posting of the notices on the claims, purport to have been made before Amos T. Gove, Justice of the Peace for Township No. 1, Fresno County, California. These affidavits are defective, in that it is not shown by the certificate of the proper officer that Amos T. Gove was a Justice of the Peace.

The affidavits of citizenship of Emanuel McMichael, Benjamin Flint, and Roscoe G. Norton are defective, in that the seal of the Notary Public is not attached.

These defects must be cured before patents can issue. When the applications are perfected, patents should issue without delay.

The papers in the cases are herewith returned. Very respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

No. 8. Protestant is not entitled to the right of appeal.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 24, 1876.

SIR: I have had under consideration the case of the Boston Quicksilver Mine, mineral entry No. 23, San Francisco, California, wherein Mr. Wm. McGarrahan has filed an appeal from your decision of August 21, 1875, denying his right of appeal from your decision of August 14, 1875, holding that the owners of said mine had shown such compliance with law as entitled them to a patent.

Amicus curiæ no right of appeal.

While it was laudable in Mr. McGarrahan to make suggestions to your office of what he believed was an attempted fraud upon the government in the matter of this application for patent, and proper for you to accept and consider such suggestions in an examination of the case, I can hardly conceive that it will be seriously contended that he, not being a party in interest, but standing in the relation of *amicus curiæ*, has a status entitling him to an appeal. I am very clearly of the opinion that he has no such right, and therefore affirm your decision to that effect.

With a view of preventing the delay arising from appeals improperly taken, I recommend that in future, whenever an appeal shall be taken which, in your opinion, is unauthorized by law and the practice of this department, you at once report the same to this office for decision.

The papers of the case transmitted with your letter of September 1, 1875, are herewith returned.

Very respectfully,
Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

No. 9. A bill in equity to enjoin defendants from applying for patent on a mining claim, not an action which can be taken notice of by the land office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 18, 1875.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: On the twenty-second August last you transmitted the papers in the case of the application of Marcus Daly for patent for the Red Pine Mine, Utah.

By the papers in the case it appears that the said application for patent was filed in your office on the twenty-fifth day of April, 1874; that the notices and diagrams were posted upon the claim from the twenty-first April, 1874, to the twenty-second August, 1874, and in the Register's office from the sixth June, 1874, to the twenty-second August, 1874; that the notice was published in the Salt Lake Weekly Tribune on the sixth June, 1874, and for eleven consecutive weeks thereafter.

The Red Pine Mine was located July 18, 1871, and record of such location was made on the same day in the Recorder's office of Ophir mining district, Tooele County, Utah.

By the abstract of title it is shown that the applicant has record title to the premises claimed.

Bill in equity to enjoin defendants from applying for patent.

On the twenty-second August, 1874, the applicant having filed proof of compliance with the local laws and Congressional enactments, was allowed to make entry of the premises as applied for, no adverse claim having been filed. On the seventeenth September, 1874, Enoch Totten, Esq., filed in this office a paper purporting to be a copy of a bill in equity, filed in the district court for the third judical district, Utah, the general nature and object of which seems to be to restrain said Daly and one Walker and others, who are joined as defendants, from further prosecuting said application for patent. The plaintiffs named in said bill are Isaac S. Waterman and George R. Ayers. Whether or not any proceedings have in fact been had under said bill does not appear, nor is it necesary to inquire, since it is not such action as can be taken notice of by this office. At the same time were filed the affidavits of George R. Ayers and Levi Smiley.

In the sworn statement of Mr. Smiley, he alleges that he had never seen the survey stakes of the "Red Pine survey, and never had any knowledge that such a survey had been made." That he had never seen the plat and notice of application for a patent for said mine, although he had frequently passed over the ground included in such survey since June 1, 1874; that he had no knowledge that said application for patent had been made until September 7,

1874; that he is mining captain on the St. Louis and Hidden Treasure mine.

In his sworn statement Mr. Ayers alleges, that he is the same person who made oath to said bill which was filed in the office of the clerk of the court of the third judicial district, Utah, on the eleventh September, 1874, in which Isaac S. Waterman and George R. Ayers are plaintiffs.

In the case under consideration no adverse claim was filed within the time prescribed by the statute.

The sixth section of the mining act provides that an adverse claim to be considered must be filed within the sixty days notice by publication, "and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act."

The protestants urge that the location of the Red Pine was void for uncertainty.

The fourth section of the district laws in force at the date of said location provides "that the notice shall state the number of feet claimed in the location, number claimed each side of monument, the names of the parties locating the same, and the number of feet claimed by each locator, name by which the ledge or lode shall be known." Section seven provides that "in making a record of location of any claim, the same shall be definitely described with reference to some natural or artificial monument."

Section twenty-one of said laws provides that "the recorder in person, or through his deputies, go on the ground before filing a location for record, and see that the proper notice and monument are placed thereon, and note on the notice and in a book for that purpose the locality of said location."

The location notice in the case under consideration reads as follows:

"Red Pine—Located July 18, 1871.

"Notice:

"We, the undersigned, have this day located and claimed one thousand feet on this lead, lode, ledge, or deposit, together with all dips, spurs, and angles. We claim it according to the laws of Ophir Mining District and the laws

of the United States. This mine to be known as the Red Pine.

"Jesse Foster, 400 feet.
"Cancey Porter, 200 feet.
"E. V. Ankram, 200 feet.
"W. Ankram, 200 feet.

"We claim five hundred feet easterly and five hundred feet westerly.

"Situate about two hundred feet easterly from the Sacramento."

This notice seems to meet all the requirements of the local law, and to have been made in accordance therewith.

It will be observed that it is made the duty of the recorder or his deputy to "go on the ground before filing a location for record, and see that the proper notice and monument are placed thereon."

This notice *was filed for record* on the eighteenth of July, 1871, *and recorded.*

This act of the recorder may be fairly appealed to as being corroborative of the sworn statement of the applicant that the local law had been complied with in the matter of said location. Accompanying the other papers filed with said application is the sworn statement of two persons, who allege that they are well acquainted with the Red Pine mining claim, and that the survey of said claim, made by J. Gorlinski, deputy mineral surveyor, in their presence, "embraces the identical ground as originally claimed by the locators and grantors of said mining claim."

The applicants allege compliance with the local laws, and have filed satisfactory evidence of such compliance. The survey seems to have been regularly made, and the notice and diagram conspicuously posted upon the claim, to wit, upon the discovery shaft of said Red Pine lode.

Messrs. Waterman and Ayers also urge that the notice of intention to apply for a patent was not properly given, for the reason that the published notice required adverse claims to be filed within sixty days from the sixth of June, 1874, the date of the first publication, while the notice posted upon the claim, dated April 21, 1874, concludes with these words: "Any and all persons claiming adversely * * * are hereby notified that, *unless their adverse claims*

are duly filed as according to law and the regulations thereunder, within sixty days from the date hereof, with the register of the United States Land Office at Salt Lake City, * * * * they will be barred, in virtue of the provisions of said statute."

This gratuitous information on the part of the applicant is not shown to have injured any party or person, nor yet could their rights have been adversely affected had any parties filed an adverse claim against said application, "according to law and the instructions thereunder."

Having carefully considered all the papers filed by the applicant and protestants, I am of the opinion that the applicant has shown compliance with the law, and that patent should issue for said mine, as applied for.

You will inform all parties in interest, and acknowledge the receipt hereof.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner*.

CHAPTER VII.

PLACER CLAIMS.

No. 1. Must both be "held" and "worked."
No. 2. Annual expenditures not required by United States laws.
No. 3. Area of location.
No. 4. *a.* Area of location.
b. Must make publication and post notice notwithstanding claim has been held for the period prescribed by the Statute of Limitation.
No. 5. Locations made prior to July 9, 1870, upon land not yet surveyed, patented in any *shape* and to any *area*.
No. 6. Joint entry.
No. 7. Land treated as unsurveyed until plat of survey filed in local office.
No. 8. *a.* One notice in a newspaper for several claims, by same party or association, sufficient.
b. Diagram and notice required to be posted on each parcel.
No. 9. What is conveyed by patent.
No. 10. Construction of section 10, Act of May 10, 1872.
No. 11. Timber on mineral land in limits of grant to the Central Pacific Railroad Company.
No. 12. *a.* Locations prior to July 9, 1870, regulated as to size by local law.
b. A person or association may purchase distinct locations and apply for patent on entire claim.
c. Five hundred dollars expenditure not required on each location where they are contiguous and constitute one claim.
No. 13. Require proof that placer contains no known vein of quartz, etc.
No. 14. North Leadville v. Searle.
No. 15. A placer is a surface claim, and when such claim is anterior to the town occupation no exception clause in favor of town-site will be inserted in patent.
No. 16. Evidence as to relative value of land for town-site or mining purposes inadmissible.
No. 17. *a.* Burden of proof as to character of land.
b. Land in Indian Reservation reserved from all disposal.
c. Policy of the Government to encourage the development of the mining resources.

No. 1. Under the thirteenth section of the act of May 10, 1872, the claim must be both held and worked.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., May 15, 1875.

SIR: I have considered the motion for a rehearing filed by the claimant, in the *ex parte* case of the Gem lode, Montana Territory, decided by the department, adversely to the claimant, January 22, 1875.

The motion alleges two errors in the decision, viz.: 1. The ruling that by local law the width of surface ground for lode claims in said Territory is limited to fifty feet on each side of the center of the lode. 2. The finding that claimant was not entitled to a patent by virtue of compliance with the provisions of the thirteenth sections of the act of July 9, 1870.

With reference to the first alleged error, I am satisfied upon a re-examination of the question that the construction given by the former decision to the Territorial act is the correct one, and that the same should be adhered to.*

The decision of the department upon the second point mentioned was in substance that the claimant had not furnished satisfactory evidence that he or his grantors had, in the language of the statute, "held and worked" his claim for a period equal to the time prescribed by the Statute of Limitation for mining claims in the Territory of Montana. The argument in support of the motion is to the effect that no *work* was required in order to hold the claim by either local law or the laws of the United States until January 1, 1875, and that as the applicant had *held* said claim in accordance with local laws for the period prescribed by the thirteenth section of the act of 1872, he was therefore entitled upon showing that fact to a patent from the United States.

Claim must be both held and worked.

This position is, in my opinion, entirely untenable. The language of the thirteenth section is perfectly clear and unambiguous. The claim must be "*held and worked,*" not simply *held* or simply *worked,* but held *and* worked. No reference is made to the method of holding or working, or the manner in which the same is to be done, and there can therefore be no presumption that such method or manner is such as is contemplated by local laws, when such laws are inconsistent with the statute.†

The provision of the act referred to is a plain require-

* Reversed by decision of July 24, 1876, in case of Tootle, Hanna et al. See No. 14. Application.

† Mining claims on the public lands must be held and worked in accordance with the local mining laws adopted and in force in the mining district where the same are located: Strange v. Ryan, 46 Cal. 33.

ment that other evidence to support the claim shall be waived where the premises are shown to have been, in the general and ordinary acceptation of the terms, held and worked for a specified period and no adverse claim has intervened. It is not pretended that this was done in the case under consideration.

The motion is therefore overruled, and the papers transmitted herewith to your office for the files of the case. You will notify the claimant of this action.

Very respectfully,

B. R. COWAN, *Acting Secretary.*

To the Commissioner of the General Land Office.

No. 2. Annual expenditures on placer claims are not required by the laws of the United States, but are subject to the operation of the local laws, rules, regulations, and customs, only.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 25, 1874.

R. B. PATTON, Esq., *Sweetland, California.*

SIR: In your letter of the thirty-first ultimo, you inquire whether or not the mining acts of Congress require certain annual expenditures upon placer mines to entitle parties to hold the same.

In reply, I would state that the first general act of Congress regulating the disposal of mineral lands was that of July 26, 1866, which only applied to veins or lodes of quartz, or other rock, in place, bearing gold, silver, cinnabar, or copper.

The act of July 26, 1866, was amended by the act of July 9, 1870, and provision was made for the disposal of "claims usually called placers," "including all forms of deposit excepting veins of quartz, or other rock in place."

Neither of these acts prescribed the amount of work or expenditures which should be made annually upon mining claims to enable parties to hold the same, but left this matter to be determined by the local laws, rules, regulations, and customs.

The act of May 10, 1872, repealed certain portions of the mining acts then in force, and, among other things, pre-

scribed a new mode of procedure for obtaining patents to mining claims.

The fifth section of the act last referred to provides that "the miners of each mining district may make rules and regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: * * * * on each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor."

The only reference made to the subject of annual expenditures upon mining claims is found in said fifth section, which provides that on each claim located since May 10, 1872, one hundred dollars shall be annually expended, and on all claims located prior to said date, ten dollars' worth of labor shall be performed or improvements made each year *for each one hundred feet in length along the vein.*

The tenth section of said act of May 10, 1872, provides that the act of July 9, 1870, "shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims."

Annual expenditures required on vein or lode claims only.

The tenth section taken in connection with the fifth section of the act of May 10, 1872, makes it clear to my mind that it was the intention of Congress to require annual expenditures only upon vein or lode claims, leaving placer claims, as they had been previous to the passage of said act, subject to the operation of the local laws, rules, regulations, and customs.

Very respectfully,

W. W. CURTIS, *Acting Commissioner.*

No. 3. Letter stating the provisions of the acts of July 9, 1870, and May 10, 1872, in regard to the size of placer locations, and the effect of the local laws thereon.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 19, 1873.

A. B. BEAUVAIS, Esq., *Columbia, California.*

SIR: Referring to your communication of the twenty-fifth ultimo, I would state that the mining act of July 9, 1870, declares that "no location of a placer claim hereafter made *shall exceed* one hundred and sixty acres," etc.

The act of May 10, 1872, provides that no such locations hereafter made "shall *include more* than twenty acres for each individual claimant," etc.

The mining regulations of the different mining districts remain intact and in full force, with regard to the size of locations, where they do not permit locations in *excess* of the limits fixed by Congress. Where such regulations permit locations in excess of the maximum fixed by Congress as aforesaid, they are restricted accordingly.

In the case presented by you, where the local law provides that placer locations shall not exceed one hundred feet square to an individual, no more than that amount can be located, unless the local mining laws are amended in such a way as to allow claims of a greater size to be located.

Very respectfully, etc.,
W. W. CURTIS, *Acting Commissioner.*

No. 4. 1. Area which may be applied for as a placer claim.

2. An applicant for patent on a placer claim, who has held possession of his claim for a period which satisfies the statute of limitations of his State or Territory, is not excused from publishing and posting notice of his application.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, September 20, 1879.

Messrs. SMITH BROS., *Peels Marsh, Nevada.*

GENTLEMEN: In reply to your letter of the sixteenth ultimo, you are informed that the area which may be applied for as a placer claim is unlimited, provided the separate locations constituting it were of legal quantity, properly made, are all contiguous, making one tract, and the entire title is in ap-

plicant for patent. Claims which include all forms of deposit, except veins of quartz or other rock in place, are treated as *placers;* five hundred dollars expenditures are required on each *claim*, and not on each location, when applying for patent to land situated as aforesaid.

Statute of limitation.

The fact that a party bases his right to a patent on a claim that he has held his land for a period which satisfies the statutes of limitation of his State or Territory, does not avoid the necessity of publishing and posting notices of his application for patent as in other cases.

Very respectfully,

I. M. ARMSTRONG, *Acting Commissioner.*

No. 5. Locations of placer claims made prior to July 9, 1870, upon lands over which the public surveys have not yet been extended, may be patented in any shape or to any area not in conflict with local laws or regulations.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, March 1, 1871.

Hon. A. A. SARGENT, *House of Representatives.*

SIR: * * * In mining districts over which the lines of the public surveys have not yet been extended, a placer claim held and occupied according to the district regulations, and upon which not less than one thousand dollars have been expended, may, in the absence of an adverse claimant and after the usual proceedings, be surveyed, entered, and patented, whatever may be its shape or area, provided that such claim was located at a date prior to the passage of said statute of July 9, 1870, which interdicts, after that date, the location of a claim by any person, or association of persons, in extent exceeding one hundred and sixty acres, whatever the mining regulations of the district may prescribe. But upon lands which have been surveyed, no lot or claim smaller than ten acres can be patented to any person or association of persons under said act; the subdivision of forty-acre tracts into ten-acre legal subdivisions, to be effected in the manner prescribed by the law and instructions.

I am, sir, very respectfully,

Your obedient servant,

WILLIS DRUMMOND, *Commissioner.*

No. 6. Two or more persons owning divided or undivided interests in a placer claim may make joint application for patent thereon.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 28, 1875.

Register and Receiver, Elko, Nevada.

GENTLEMEN: With your letter of the eleventh ultimo, you submitted the papers in case of the application of Dudley Chase and nine others, for patent for certain placer mining ground.

It appears from the papers in the case, that the several applicants own separate and distinct interests; that the said applicants are an association of persons unincorporated; that the required amount has been expended upon this claim at the joint expense of the several members of said association.

An application for patent may be filed by an association of two or more persons owning divided or undivided interests in the premises for which patent is sought, and where the required improvements have been made upon the premises described in the application, jointly by the several owners, the said association of persons may receive patent therefor upon full compliance with the law and instructions.

* * * * * * * *

Very respectfully, your obedient servant,
S. S. BURDETT, *Commissioner.*

No. 7. Until the township plat of survey approved by the Surveyor-general has been filed in the local office, the Register and Receiver will treat an application for patent on placer claim as being made for unsurveyed land.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 22, 1871.

Register and Receiver, Sacramento, California.

GENTLEMEN: With the Register's letter of the sixth inst. were received copies of the papers filed in the application of John C. Bower et al., for patent under the act of July 9, 1870, for what is known as the "Powell" placer claim, situate in Todd's Valley mining district, Placer county, California, and with reference to the inquiries I would reply,

that if (as stated) the township plat had not been filed in your office at the date of this application, you should have considered the claim as upon unsurveyed land, and dealt with it accordingly.

You are, therefore, directed to immediately notify these applicants that they will be allowed to proceed with their application, and to include in their diagram and notice only the mining ground and premises to which they hold the right of possession agreeably to the local customs, rules, or regulations of the miners in the district, or which they have by themselves, or grantors, held and worked for a period equal to the time prescribed by the statute of limitations for mining claims in the State of California.

In all cases you will deal with claims of this kind as upon *unsurveyed land*, until the township plat approved by the Surveyor-general shall have been filed in your office.

* * * Very respectfully,

WILLIS DRUMMOND, *Commissioner*.

No. 8. 1. One notice in a newspaper of the application for patent may include a description of all tracts desired to be entered by an individual or association, provided they are in the same neighborhood, although not contiguous.

2. Diagram and notice must be posted on each parcel.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, November 19, 1870.

Hon. A. A. SARGENT, *House of Representatives, Washington, D. C.*

SIR: I have the honor to acknowledge the receipt of your letter of yesterday, inclosing one herewith returned from S. B. McFarland, Esq., dated at Sacramento, Cal., the eleventh instant, and with reference to the subject of inquiry I have to state that where several placer claims have been surveyed by the United States for an individual or company holding the possessory right thereto, under the local laws, there is nothing to prevent the patenting of the several tracts or parcels of mineral ground thus surveyed as a single entry, and the local land officers will be instructed accordingly.

Publication.

With regard to the matter of newspaper publication in such cases, one notice may include a description of all the

tracts or parcels desired to be entered by an individual or company holding the same, as aforesaid. But such notice must give a sufficiently accurate description of each parcel or tract applied for, as will enable other parties in the neighborhood to tell readily what mineral grounds are sought to be patented.

Diagram and notice.

In these cases, it is not deemed proper to make any departure from our regulations, requiring diagram and notice to be posted on the claim for ninety days, as required by law, it being considered essential that a diagram of *each parcel*, together with a copy of the notice of intention to apply for a patent therefor, should be posted thereon for ninety days. The notice, to be posted for a like period in the register's office, may consist of a copy of that published in the newspaper, as aforesaid.

The foregoing, it is not intended, should be understood as authorizing the joint entry of parcels or claims situate at wide distances from each other in different land or mining districts, but simply to enable individuals or companies holding several placer claims in the same neighborhood, though not contiguous, to effect their entries, and have their rights adjudicated with as little expense as possible.

I am, sir, very respectfully,

JOS. S. WILSON, *Commissioner.*

No. 9. What patent for placer claim conveys.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 29, 1875.

Hon. H. F. PAGE, *Placerville, Cal.*

SIR: Referring to your letter of the nineteenth instant, I have to state that all patents, except those issued under the provisions of the eleventh section of the mining act, contain an excepting clause, as follows, viz.: "That should any vein or lode of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, *be claimed or known to exist* within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

By the terms of the act, a patent for a placer claim conveys "all valuable minerals and other deposits within the boundaries thereof," if no veins or lodes are claimed or known to exist within the exterior limits of the claim patented at the date of the patent. In cases arising under the said eleventh section, the same excepting clause is inserted with this exception, the word "other" is inserted after the word "any."

In all agricultural land patents, the following clause is inserted, viz., "subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes; and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted as provided by law."

No title to a mining claim can be secured under an agricultural land patent: Vide section 2258, Revised Statutes.*

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 10. Construction of section 10, Act of May 10, 1872. Section 2331, Revised Statutes.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 19, 1873.

JOHN E. BLAINE, Esq., *Surveyor-general, Montana.*

SIR: Inquiry having been made as to the construction given by this office to the tenth section of the mining act of May 10, 1872, the following is transmitted for your guidance.

Said section delares that "where said placer claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims hereafter located shall conform, as near as practicable, with the United States system of public land surveys, and the rectangular subdivisions of such surveys.

* As to the right of the General Land Office to issue a second patent, see No. 13, Adverse; also decision of the U. S. Supreme Court, in Moore v. Robbins, 6 Otto, 530.

* * * But where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands," etc.

From the foregoing, it will be seen that placer mining claims, located after May 10, 1872, must conform as nearly as practicable with the public surveys. In other words, the location of a placer mine upon surveyed land, made after May 10, 1872, should embrace legal subdivisions of the public lands, where the same can be done without interfering with the rights of other *bona fide* mineral, agricultural, or other claimants in the same tract.

Where placer mines are situate upon unsurveyed land, or where, by reason of some other *bona fide* claimant, a legal subdivision of surveyed land can not be embraced in an application for patent, a survey must be made of the premises for which a patent is sought, in accordance with circular instructions of June 10, 1872.

Very respectfully, etc.,

W. W. CURTIS, *Acting Commissioner.*

No. 11. 1. Timber growing upon mineral land within ten miles of the center line of the Central Pacific Railroad Company, except so much as is necessary to support the improvements of miners thereon, is granted to the company.

2. Excepting clause inserted in mineral patent issued for land so located.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 12, 1874.

Register and Receiver, Sacramento, Cal.

GENTLEMEN: On the twenty-third of June, 1873, the Mammoth Blue Gravel Company filed in your office an application for patent for certain placer mining ground, embraced by surveys 55 and 56, T. 16 N., R. 10 E., and survey No. 38, T. 17 N., R. 10 E., Mt. D. Mer., to wit, 1,584.13 acres. Said tracts are situated upon unsurveyed public lands.

When the public surveys shall have been extended over this region, said mining claim will be found to embrace portions of sections 1, 2, 3, 4, 10, 11, 21, 28, and 29, in T. 16 N., R. 10 E., and portions of sections 33, 34, and 35, in T. 17 N., R. 10 E., Mt. D. Mer.

On the twenty-second of August, 1873, Gustavus A. John-

son filed in your office a protest against said application, so far as the same related to the N. E. ¼ of sec. 10, T. 16 N., R. 10 E., and on the thirteenth of November, 1873, withdrew said protest.

On the twenty-third of August, 1873, the Central Pacific Railroad Company filed in your office a protest against said application, so far as the same related to sections 1, 3, 11, 21, and 29, T. 16 N., R. 10 E., and sections 33 and 35, T. 17 N., R. 10 E., M. D. M., alleging in its protest "that the lands embraced in said application, No. 491, are not mineral lands, as it is informed and believes," and "that the lands contained in said odd numbered sections were granted to said Central Pacific Railroad Company by the act of Congress, approved July 1, 1862."

Upon the filing of the last-named protest, you ordered a hearing to determine the true character of said tracts, and cited said railroad company to submit evidence in regard to the mineral or agricultural character of said tracts referred to in its protest. This hearing was held on the thirteenth of November, 1873, before you.

The testimony submitted in this case shows that the premises in dispute have been claimed and held for mineral purposes since 1866; that the same has been extensively prospected; that said mining company has expended in actual labor and improvements about sixty-five thousand dollars upon said mining claim; that the results of the mining operations thereon have shown that the land in question is mineral land, and of but little value for agricultural purposes.

This mining claim is situated in a well-known mineral region and within the mineral belt, and could not fall within the provisions of the tenth and eleventh sections of the mining act of July 26, 1866, being neither "properly" nor "clearly agricultural land."

Said tracts are, therefore, adjudged *mineral* in character, and will be treated accordingly.

The evidence shows that much valuable timber is growing upon said tracts, and the question is submitted whether such timber was granted to the Central Pacific Railroad Company as is found upon odd sections by virtue of the grant to said railroad company.

The act of Congress, approved July, 1862 (12 Stat. 489),

entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," grants to said railroad company every alternate section of public land within the limits of ten miles on each side of said road, "provided that all mineral lands shall be excepted from the operation of this act, but where the same shall contain timber, the timber thereon is hereby granted to said company." (*Vide* sec. 3.)

This act was amended by act approved July 2, 1864, (13 Stat. 356).

The fourth section of said amendatory act extends the limits of said grant to the distance of twenty miles on each side of the road, and provides that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist." * * * That the phrase, "but where the same shall contain timber, the timber thereon is hereby granted to said company in the proviso to said section three, shall not apply to the timber growing or being on any land further than ten miles from the center line of any one of said roads or branches mentioned in said act or in this act."

Timber on mineral land.

From the foregoing it will be seen that mineral lands do not pass to said railroad by virtue of its grant, but that the timber being or growing upon mineral land within ten miles of the center line of said road or branches is granted to said railroad company excepting so much as is *necessary to support the improvements* of mine owners upon the given tracts.

Excepting clause in patent.

And when patent issues for such mineral land it will be necessary to insert therein a clause excepting from the operation of the patent to said applicant all timber being or *growing upon odd-numbered sections within the limits hereinbe-*

fore referred to, except such as is "necessary to support his said improvement as a miner," as provided in said statute.

You will inform all parties in interest, and acknowledge the receipt hereof.

Should no appeal be taken from this decision within sixty days from the date of your notification to all parties in interest, you will allow said mining company to make entry of the premises described in their said application, upon full compliance with the law and instructions.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 12. 1. Placers located prior to July 9, 1870, are regulated in size by the local law.

2. A person, or association of persons, may purchase distinct locations and apply for patent on the entire claim.

3. Five hundred dollars expenditures are not required on each location where they are contiguous and constitute one claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 21, 1874.

Hon. H. F. PAGE, *House of Representatives:*

SIR: I have received by your reference a letter from Jesse J. Lyons, dated Nevada, California, August 31, 1874, and in reply thereto I would state that the size of placer claims located prior to the act of July 9, 1870, is regulated and controlled by the local law. Subsequent to July 9, 1870, and prior to May 10, 1872, no location of a placer claim can exceed one hundred and sixty acres.

From and after the passage of the mining act of May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association can exceed one hundred and sixty acres.

Purchase of distinct locations.

There is nothing in the mining acts of Congress forbidding one person or an association of persons purchasing as many *separate and distinct locations* as he or they may desire, and embracing in one application for patent the entire claim to which they have the possession and the right of possession by virtue of compliance with the local laws and congressional enactments.

Expenditures.

The law does not require an expenditure of five hundred dollars upon each *location* of a placer claim embraced in an application for patent, where the locations are contiguous and constitute one claim.

Where an application embraces two or more separate and distinct tracts of placer mining ground, the required amount, viz., five hundred dollars, should be expended upon each tract, and a copy of the diagram and notice posted upon each tract, to entitle the claimant to make entry thereof.

I return herewith Mr. Lyons' letter.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 13. In cases of application for patent for placer land, satisfactory proof must be furnished that the premises applied for do not contain any known veins of quartz or other rock in place containing gold, etc.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 27, 1873.

Register and Receiver, Helena, Montana.

GENTLEMEN: * * * This application for patent was filed under the act of July 9, 1870, and purports to be for placer mining land. The twelfth section of said act provides "that claims usually called 'placers,' including all forms of deposits, excepting veins of quartz or other rock *in place*, shall be subject to entry and patent under this act," etc.

In all cases of application for patents under this act, satisfactory proof must be presented that the premises described do not contain any known veins of quartz or other rock in place containing gold, silver, cinnabar, or copper. * * *

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 14. Townsite of North Leadville v. Scarle.

Where land in the vicinity of valuable mineral deposits is returned as mineral in character on the township plat, clear and positive proof of its non-mineral character can alone overcome the return of the Surveyor-general.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 17, 1880.

SIR: I have considered the case of the Townsite of North

Leadville v. A. D. Searle et al., involving certain tracts of land in sections 23 and 24, township 9 S., range 80 W., Leadville district, Colorado.

The only question at issue or raised by the appeal is, as to the character of the land, the townsite application being resisted on the ground that the tracts are valuable for minerals.

The undisputed facts are that the tracts were returned by the Surveyor-general as mineral land, and that they are in the midst of, and in close proximity to, very valuable gold placers, and lode or carbonate mines producing silver.

But the testimony of witnesses who have worked or prospected the land for minerals, gold and silver, and who were introduced as expert miners, is conflicting. Some found gold in paying quantities, and unhesitatingly gave it as their opinion that the land is valuable for minerals and will pay well for mining purposes, while others failed to find such results or indications as to convince them that the tracts are valuable mineral land, and others unhesitatingly say that they have no value whatever for mining by any known process.

That the land contains valuable minerals hardly any one denies; but upon the question whether the minerals are in paying quantities, the opinions of the witnesses, based upon the results of actual prospecting and comparison of surface indications with those of the surrounding lands which are being profitably worked, are very conflicting; and the question arises whether the evidence is sufficient to overcome the presumption of the Surveyor-general's return, and that raised by the fact of the proximity of known valuable mines. I think not.

After a consideration of all the testimony and of the arguments, both written and oral, I am of the opinion that the Surveyor-general's return is not overcome by proof, and that the land should be held as valuable for minerals within the meaning of section 2318 of the U. S. Revised Statutes.*

Your decision dismissing the application of the county judge to enter the tracts as a townsite, and sustaining the Surveyor-general's return, is affirmed. * * *

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

* See circulars of April 27 and September 23, 1880, Nos. 3 and 4.

No. 15. A placer is a surface claim, and where such claim is anterior to the town occupation no exception will be inserted in the placer patent in favor of the town site.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 26, 1878.

Register and Receiver, Fairplay, Colorado.

GENTLEMEN: I have examined the record of testimony submitted at a hearing in your office in the matter of a protest of Thomas Kemp against Thomas Starr's application (number one hundred and seventy-seven, in the mineral series of your office), for a patent to the "Starr Placer" claim, filed in your office March 18, 1878.

Publication was made in the Lake County Reveille, a newspaper published at Leadville, Lake county, Colorado, weekly, from the twenty-third day of March to the first day of June, 1878.

Posting of notice and plat was made on the claim and in your office for the legal period. On allegations by Thomas Kemp et al., that the land involved in said application was non-mineral in character, you were authorized to hold a hearing to determine the fact. This hearing was commenced July 30, 1878, and the record was forwarded with your letter of sixth of September last.

In the trial it was sought by Kemp et al. to show that the land was non-mineral, and of more value for a town site than for mining purposes, the claim of Starr being within the limits of the town of Leadville.

Weight of evidence.

The weight of testimony shows that all the land embraced in this claim was regarded as placer mining ground as early as 1860; that it was prospected with favorable results in different localities; that it has not all been worked because of the limited supply of water and want of proper facilities; that "California Gulch," which is a part of this claim, and lies on the southerly portion thereof, has been work for a long time, and a large amount of gold taken therefrom; that placer mining is being extended from said gulch northwardly towards the settled portion of the town; and that, while gold has been found in all parts of this claim, no one has opened a shaft on the northern part of the claim, which has been sunk to bed-rock, and it is manifestly im-

possible to estimate with any certainty the value of that part of the claim as mineral land; yet that it is mineral land, of more or less value, is clearly established by the record. It also appears that it is not feasible to work the northern portion of the claim until after the lower portion shall have been worked out; it shall be reached by slow approaches in the regular progress of operations, which are gradually being extended from California Gulch towards the north; and hence the fact that it has not been worked can not have the effect of raising even a presumption of its non-mineral character. It also appears that a portion of this claim was purchased for the St. Louis Smelting and Refining Company, by A. R. Mayer, its agent, and that expensive reduction works have been erected thereon. This enterprise, together with the reputation of the surrounding country for its mineral resources, has, within the last few months, induced a sudden influx of population, whose residence or occupancy will doubtless depend upon the mining prosperity of the locality. The evidence shows that there are probably about twelve hundred inhabitants in Leadville.

In order to prevent the land in this claim being "jumped," and its proprietors dispossessed to the extent of such occupancy, lots for building purposes were laid out on the northern part of the survey, and various persons permitted to build thereon on certain considerations, agreements being executed to convey perfect title on receiving a patent from the United States for the claim.

It seems to have been generally conceded that this mining claim was in all respects legitimate, and that title to no part thereof could be derived from any party except through the proprietors. This was evidently the understanding upon which all sales and agreements were made. Within the last few months certain parties have sought to obtain a foothold on the land embraced in this claim by building thereon without authority. It appears, however, that most of such persons were summarily removed.

Mr. Kemp, protestant, went upon the northern part of this claim, whether by any proper authority does not appear, and erected a house, which, from the evidence, is used for a drinking and gambling saloon and "dance-house." It appears that there was opposition to his building, and that he then opposed the claim of Starr. It is in the evidence that

Kemp offered to withdraw his protest on condition that the owners of the placer claim would give him title to certain lots thereon. This is not contradicted, and is to a degree an indication of Kemp's faith in the title thus sought to be derived through the mineral claim.

The facts which are clearly established by the proof are: 1. That the land in question is mineral. 2. That the mineral claims represented by Starr had their inception long prior to the occupation of any portion of said land as a town site. 3. That a large amount of money has been expended thereon in developing the mine, in the construction of reduction works, and in bringing water from a distance to work the claim, and that the development of the mine is proceeding in good faith.

From these facts I conclude that the application of Thomas Starr, when duly perfected, should be allowed, and that no exception of any town rights should be inserted in the patent for the reason that his claim is a surface claim, and is anterior to town site occupation, no adverse or conflicting right having been acquired by the town or by individual settlers who went there with record notice of the ownership of said placer ground. It is proper to add that there is no opposition to Starr's application by the town authorities of Leadville.

The affidavit of Thomas Starr, stating in detail all charges and fees paid by him for publication and surveys, together with all fees and moneys paid to the register and receiver of the land office, in the matter of his said application for patent, will be required.

Duly notify all parties in interest hereof, allow sixty days for appeal, and thereafter make prompt report to this office.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 16. Thomas Kemp et al. v. Thomas Starr.

1. Placer mining ground "valuable for minerals" should be reserved from sale, except as provided by law regulating the sale of mineral lands.

2. In a hearing to determine the character of the land, evidence should not be submitted as to the relative value of the land for town site or mining purposes.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, March 4, 1879.

SIR: I have considered the case of Thomas Kemp et al.

v. Thomas Starr, involving mineral application No. 177, Fair Play, Colorado, on appeal from your decision of October 26, 1878, holding that the land in question is mineral in character.

Mr. Starr made application to enter a tract of land containing 164.61 acres as a placer mining ground, March 18, 1878. Publication was made, and notice and plat were posted as required by law. No adverse claim was filed or suit commenced within the statutory period; hence those who contest the application of Mr. Starr can, under the established rules of this department, appear only as protestants.

Subsequently, allegations were made that the land embraced in the application of Mr. Starr was not mineral in character, and an investigation was ordered by you at the local office.

At the hearing held, evidence as to the character of the land was submitted, and also as to its relative value for mining and town-site purposes. The evidence of the numerous witnesses was, as is usual in such cases, conflicting and contradictory.

After a careful consideration of the same, I concur with you that the land embraced in the application is land which should, under the provisions of section 2318, Revised Statutes, be held as "valuable for minerals," and should be reserved from sale, except as provided by law regulating the sale of mineral lands.*

In my opinion, the evidence submitted as to the relative value of the land for town-site or mining purposes was improperly allowed.

If the land is mineral, it was subject to location only under the provision of the mining law without reference to the relative value of a portion of the tract for town-site purposes.

I see no reason why the rule which has been established, and uniformly followed by this department for several years, viz., that in the absence of an adverse claim, a protestant can not be recognized as an appellant from your decision, upon an application upon its merits, should be reversed in this case.

* See circulars of April 27, 1880, and September 23, 1880, Nos. 3 and 4.

Your decision, that the land in question is mineral in character, is affirmed. As the character of the land is the only one properly before me on appeal, the case should be treated as an *ex parte* case in all other respects; and, if the applicant has shown full compliance with the law, patent should issue to him for the tract claimed.

The papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 17. 1. Where land is located in a well-known mineral region, the burden of proof is upon the person alleging the same to be agricultural in character.*

2. As between placer and town site, claimant's testimony as to relative value inadmissible.

3. Lands included in an Indian reservation, reserved from disposal under either the agricultural or mineral laws.

4. The policy of the government is to encourage the development of the mining resources.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 4, 1880.

Register and Receiver, Deadwood, Dakota.

GENTLEMEN: I have examined the record of testimony taken at the hearing ordered by letter from this office, dated April 10, 1879, to determine the character of the land embraced in the entry of the town site of Deadwood, made July 29, 1878, by John R. Fraser, probate judge of Lawrence county, Dakota.

Burden of proof.

At the hearing you held that the burden of proof devolved upon the mineral claimants to establish the mineral character of the land. In making this ruling you were in error. The said entry was made upon unsurveyed lands; the lands were in a well-known mineral region; several mining claims had already been entered and many more located; in short, it is well known as a matter of recent history that the mineral character of the locality was the sole incentive to the immigration which peopled the district, resulted in a release of the same from the Sioux Indian Reservation, and made

*See Land Office Circular, dated April 27, 1880, No. 3, this volume. See also circular, dated September 23, 1880, No. 4.

necessary the establishment of a United States land office in that place. No formal withdrawal of the lands in question could have added force to the presumption of their mineral character. They were upon unsurveyed land, and hence no withdrawal could have given them a description by particular designation, while the law itself reserved them, by their known character, for conditional disposal only. It also may be added that by no official act or proceeding was a presumption of their non-mineral character ever raised. The presumption was that the lands were mineral, and the burden of proof, therefore, was upon those who claimed to enter them as non-mineral lands.

By decision of this office, in case of the town site of Central City, Colorado, vs. mineral claimants, dated December 23, 1875, and affirmed by the Hon. Secretary of the Interior June 6, 1876, the mineral and town-site laws (Sec. 2386 R. S.) were construed to permit town-site entries *overlying lode claims*. In this the two laws aforesaid are consistent, as a surface proprietorship by the town is compatible with an adverse ownership of veins of ore beneath; and the law seemed clearly to contemplate that condition of things, as will appear by reference to said section 2386, which limited its provisions to town proprietorship of the surface over *veins*.

Relative value.

In *placer* mining land, however, no fact is better established than that the surface is essential to its development as mining ground. By decision of the Hon. Secretary of the Interior, dated March 4, 1879, in case of Kemp et al. v. Starr, in Leadville, Colorado, it was declared, the land being placer, that as it was "valuable for minerals," is was not subject to entry as a town site, and that the testimony introduced to show that the land was more valuable for town purposes than for mining was improperly received.

If, therefore, the land embraced in the town site of Deadwood is valuable for placer mines, it can not be patented to the trustee of the town to be sold by him under local laws.

The record of testimony consists of upward of eighteen hundred manuscript pages, a volume too great to be here discussed in detail. It has been carefully read, however,

and the conclusion reached that no portion of the land entered as the town site of Deadwood (which includes that of Ingleside) is proven to non-mineral—that is to say, that the presumed mineral character of the land has not been rebutted. I am further of opinion that all of the land included within said town site claimed for placer mining purposes, respecting which testimony was taken, has been conclusively shown by the testimony to be valuable for minerals, and hence must be held for disposal under the mining act, and patent can not issue therefor for townsite purposes.

I find from the testimony that several of these claims have yielded large quantities of gold. It is undisputed that from one more than fifty thousand dollars' worth of gold has been taken; from another more than forty thousand dollars, and several have yielded from four thousand dollars to twenty thousand dollars. Other claims, where the aggregate yield is not stated, have produced from three dollars to ten dollars per day to the man employed in working the same.

A number of claims, shown by prospecting to contain gold, have yielded no return, and the testimony shows that no attempt has been made to work them further than required by the local laws for their "representation." It further appears that at the present time none of the claims are being worked except for the purpose of sustaining the possessory title.

I am led to believe that, with perhaps a few exceptions, none of these claims can be worked with profit until the owners can have unrestricted possession of the ground for mining purposes. Ditches must be dug, and those already constructed kept open for the passage of water; space must be had for the deposit of tailings or refuse; and the surface of the ground must be unincumbered, that it may readily be removed, washed out, and the gold extracted. All of these conditions are absolutely incompatible with the existence of streets, alleys, and buildings, and hence the argument of counsel for the town site, that patent should issue to both parties, the town site and mineral applicants, if concurred in and acted upon, would allow but one party to derive advan-

tage from the grant. If used for town site purposes, it can not be mined.

Reserved land.

Prior to the twenty-eighth day of February, 1877, the entire tract in controversy was included within the limits of the Sioux Indian Reservation, and all persons other than these Indians and certain agents of the government were forbidden by law, under severe penalties, from making settlement therein for any purpose whatever. Notwithstanding this prohibition, the country was visited by prospectors, who discovered gold, and the reports of these discoveries led to a large influx of population. Placer claims were found on land now in controversy, and were worked for the gold they contained. These claims were staked off, in accordance with local rules, and recorded, by which the character of the land was given the utmost notoriety. These locations were void and unlawful, and under them the locators gained no title whatever, yet they served the purpose of giving notice to all concerned of the character of the land. While portions of the claims were being worked for the gold they contained, other portions were rapidly occupied for various purposes, and at the ratification of the agreement with the Sioux Indians, quite a populous town had become established. At this date, February 28, 1877, the land was rendered subject to general occupation, and a lawful settlement might for the first time be made.

Theretofore the occupation of the land by miner, merchant, or any other person, was alike unlawful and prohibited under penalty provided by law; thereafter, it might be occupied in accordance with law. Section 2318, Revised Statutes, reads: "In all cases, lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

If the land was "valuable for minerals," as claimed, it could, under section 2318, only be lawfully claimed for mining purposes; and the fact that improvements had been made by persons acting at their peril, in direct violation of law, gave them no sort of color of right to retain possession of the same to the prejudice of others claiming in pursuance of law. If the land was not mineral, no valid mining location could have been made upon it.

The large population attracted to Deadwood by the mineral discoveries, engaged in the various occupations called for in a mining camp. A municipal government was established, streets and alleys were laid out, and many buildings, temporary and permanent, were erected.

The operations of the miners soon clashed with these town improvements. Some of the mineral claimants made application for patent and entered their claims, and others were preparing to take the same steps to procure full titles to their lands, whereupon those claiming for town site purposes petitioned the probate judge of Lawrence county to enter the land for town-site purposes, which he did.

The miners were then restrained, in many instances, from working their claims, sometimes by the road commissioner, and at others by warrants in the hands of the sheriff, and again by the citizens themselves, acting without color of authority. Ditches were filled up, sluice-boxes and drains destroyed, and the miners themselves sometimes arrested and put under bonds to refrain from further injuring the town improvements or those of private citizens. Though the miner was not actually evicted from his claim, he was only allowed the barren privilege of digging therein, but if without the power to construct ditches to bring and carry away water, such permission was without practical value. In short, Deadwood assumed the powers and privileges of a municipal government, unrestricted by United States laws, and in pursuance thereof its officers took ordinary measures and precautions to keep its thoroughfares open to public travel—proceedings proper enough where the town authorities are entitled to jurisdiction, but otherwise when they would defeat rights guaranteed by United States laws.

Policy of the government.

It is the settled policy of the government to encourage the development of mines and the production of the precious metals. The law makes every other claim to the public lands subordinate to their occupation and possession for mining purposes, and no deviation from this policy is made in favor of town sites, the mining interests being jealously protected where it permits lands overlying veins to be patented for town-site purposes.

In conclusion, I must hold that all of the land claimed for mining purposes, as to which testimony was taken at the hearing, is shown to be valuable for minerals. These claims are designated as follows:

Mineral lots (as designated by the surveyor-general) Nos. 38, 76, 72, 45, 53, 71, 78, 97, 109, 86, 83, 75, and 107; placer claims 13, 14, and 15, above discovery, and 16, 13, and 24, below discovery, Lost Mining District; claims 16, 17, 18, and 19, above discovery, Whitewood Mining District; and claims Nos. 8, 9, and 10, on Whitewood creek in the northeastern portion of the town site of Deadwood. Concerning the three claims last named, I am unable to determine, from the testimony and map submitted, whether the same are situated in Lost or Whitewood Mining Districts.

As to the land lying outside of the placer claims, there is not sufficient testimony to enable me to form an intelligent opinion as to its character. The adjacent land having been shown to be valuable for minerals strengthens the presumption which heretofore obtained as to the whole tract, and this outside land will still be regarded as mineral until the contrary be proven. The only testimony offered at the hearing relating to this portion of the town site was that of Mr. L. C. Miller, an insurance and mining broker, who claims to be an experienced placer miner. He says that there are no mining claims located outside of the gulches, and, from the character of the ground, it is well known that there is no pay in it. This, I must hold, is insufficient to rebut the presumed mineral character of the land, supported as that presumption is by the testimony which shows the adjoining ground to be valuable mineral land. A motion for a new hearing as to this doubtful portion will be entertained when the present town-site entry shall have been finally disposed of.

The town site of Ingleside is included within the limits of Deadwood, and both entries must be held for cancellation.

Give due notice hereof to all parties in interest, allow sixty days for appeal, and thereafter report promptly to this office. Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

CHAPTER VIII.

TUNNEL LOCATIONS.

No. 1. *a.* How held and worked.
b. Lodes discovered in tunnel to be staked off and located.
No. 2. *a.* Line of tunnel is the width thereof.
b. Lodes discovered in tunnel, how located.
No. 3. Locators of tunnel rights expected to use reasonable diligence.
No. 4. *a.* No patent for lode without surface ground.
b. Survey of a lode discovered in a tunnel not to be made until apex thereof has been ascertained by sinking shaft or otherwise.
No. 5. Tunnel locations not patented.

No. 1. 1. Tunnels, how held and worked.

2. Each lode discovered in the tunnel should be staked off and located as though discovered from the surface.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 12, 1878.

DAVID HUNTER, Esq., *Deadwood, Dakota.*

SIR: In reply to your letter of the thirtieth ultimo, asking my construction of the words "which were not previously known to exist," found in section 2323, Revised Statutes of the United States, and whether the owners of a tunnel are required to stake off and survey each and every lode, etc. I have to advise you that section 2323 contemplates the running of a tunnel "for the development of a vein or lode, or for the *discovery* of mines:" and the right of possession of all veins or lodes within three thousand feet from the face (or opening) of such tunnel, "*on the line thereof* not previously known to exist, *discovered in such tunnel to the same extent as if discovered from the surface,*" is granted to the owner of such tunnel.

The *line* of such tunnel is held to be the width thereof, and no more, and upon this line only is prospecting for blind lodes prohibited while the tunnel is in progress. The words "not previously known to exist," refer to undiscovered veins or lodes.

How held.

The proprietors of the tunnel are required to give proper

notice of their tunnel location at the time they enter cover, by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving names of the tunnel proprietors; the actual or proposed course of the tunnel; the height and width thereof; the course and distance from such point of commencement to permanent, well-known objects in the vicinity by which to fix its locus. And at the time of posting said notice, the owners must establish the boundary lines of the tunnel by stakes or monuments placed along such lines at proper intervals to the terminus of the three thousand feet from the point of commencement within the lines so marked. Prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence. When a lode is struck, the surface ground which overlies the apex of the mine must be ascertained, and the claim then duly located as if discovered from the surface.

Stake each lode.

Manifestly the discoverer should ascertain what surface ground covers his lode, and for his own protection stake off his claim; and this is necessary on each lode discovered.

The tunnel is a means of discovery. When the lode is discovered, the tunnel proprietor must proceed in locating his surface ground, staking off the same, posting notice, recording, etc., as if the mine were discovered from the surface. * * *

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 2. 1. The *line* of tunnel is construed to be the width thereof.

2. The fifteen hundred feet of a lode discovered by running a tunnel, may be located on one side of the point of discovery or intersection, or partly on one side and partly on the other.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 3, 1876.

Register and Receiver, Central City, Col.

GENTLEMEN: On the twenty-fourth of November, 1875, W. G. Bell, Samuel Cockran, and John W. Nicholson filed

in your office an application for patent for fifteen hundred linear feet of the Slide Lode, Gold Hill Mining District, Boulder county, Colorado.

The notice was published in the Weekly Sunshine Courier for the period of sixty days, to wit, from the fourth of December, 1875, to the twelfth of February, 1876, inclusive. The plat and notice were duly posted on the premises and in the Register's office.

By an abstract of title on file from the office of the County Clerk of Boulder county, Col., it is shown that said lode was discovered on the twenty-sixth of July, 1875, located July thirtieth, and recorded the thirty-first of July, 1875. It is also shown that said applicants have record title to the whole of said location. The applicants have shown compliance with the law.

On the twentieth of January, 1876, the Corning Tunnel, Mining, and Reduction Company, by its president, Frederick A. Squires, filed an adverse claim against said application. In his sworn statement, Mr. Squires alleges that he is the president of said company; that said Slide lode is within the location of a tunnel site claimed by said company; that said Slide lode is a blind lode, and was discovered subsequent to the location of said tunnel site; that said tunnel site was located in accordance with the mining act of May 10, 1872, and upon which said company has expended a large amount of money; that the rights of said company were acquired long prior to those of said applicants.

By a copy of the location notice it appears that George C. Corning and three others, on the eighteenth of September, 1872, located and recorded said tunnel site, and on the fourteenth of July, 1873, made record of a second location of said premises dated July 9, 1873. In this second location the tunnel is described as seven feet high, six feet wide, and one hundred and thirty feet in length. It is also shown that said company has the record title to said tunnel site and location.

The applicants for patent have filed the sworn statement of John J. Scholes, Thomas Cryder, Daniel Drummond, Jehiel Franklin, Smith E. Stevens, and Burrel McPherson. In his sworn statement Mr. Scholes alleges that he was the discoverer of said Slide lode; that he "was led to dig for

and to discover said lode by the indications and out-croppings of the said lode on the surface; that they were very distinct and marked; that it was no blind lode in any sense of the word; that it showed very plainly. * * * That at the time of the application for the patent there was a tunnel run in on the lode fifty feet, and a shaft sunk on said lode at least fifty feet, and other outside work done * * * of a total value of at least two thousand dollars."

In his sworn statement, Cryder alleges that he is well acquainted with the Slide lode; that he saw the Slide lode about a month after its discovery, and very frequently since; that it is no blind lode, but was discovered from the surface; "that the outcroppings on said lode are quite distinct and marked, and that good ore was obtained at the immediate surface."

Drummond, in his sworn statement, states that he is well acquainted with the Slide Lode; that the croppings on said lode "are visible on the surface—situated in line; that there are several prospect holes on the said lode, and the aforesaid croppings are on a line between these prospect holes on the said lode; should say emphatically that the said Slide Lode was not a blind lode, and that it was discovered from the surface."

Franklin, in his sworn statement, alleges that he is a practical miner and has been engaged in the business many years; that he was at the said Slide Lode within a week after its discovery, and a great many times since. "That the outcroppings on said lode are so evident as to justify any one in digging for said lode; that it is not a blind lode, and that it was discovered from the surface."

McPherson, in his sworn statement, alleges that he is well acquainted with said Slide Lode; that "he knows that the said Slide Lode is not what is called a blind lode, because of the croppings of said lode plainly appearing on the surface, and of its also being discovered from the surface."

Stevens, in his sworn statement, corroborates the statements above referred to, to the effect that the surface indications and outcroppings conclusively demonstrate the fact that said lode is not a *blind lode.*

The fourth section of the mining act of May 10, 1872—

Revised Statutes, sec. 2323—provides that "where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel, on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface, and locations on the line of such tunnel, of veins or lodes, not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted, with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered an abandonment of the right to all undiscovered veins on the line of said tunnel."

The uniform construction given to this section of the law by this office is embodied into the land office report for the year 1872, pp. 60, 61. As the construction therein given has been followed, I embrace the same in this decision as showing the rights acquired by tunnel locations.

Line of tunnel—What may be entered.

"The *line* of the tunnel is the *width* thereof, and no more; and that upon *this line* only is prospecting for blind lodes prohibited while the working of the tunnel is in progress; and the right is granted to the tunnel owners to fifteen hundred feet of each blind lode not previously known to exist, which may be discovered in such tunnel, but that other parties are in no way debarred from prospecting for blind lodes or running tunnels, so long as they keep without the *line of the tunnel* as herein defined; the said line being required, by regulations, to be marked on the surface by stakes or monuments placed along the same from the face or point of commencement to the terminus of the tunnel line aforesaid.* When a lode is struck or discovered for first time, by running a tunnel, the tunnel owners have the option of recording their claim of fifteen hundred feet all on one side of the point of discovery or intersection, or partly upon one and partly upon the other side thereof; but in no case can they so record a claim as to absorb the actual or constructive claim or possession of other parties on a

*Corning Tunnel Co. v. Pell, 4 Col. 507.

lode which has been discovered and claimed outside the line of the tunnel, before the discovery thereof in the tunnel."

The location under which said company claims title describes a tract of land three thousand by fifteen hundred feet, and embraces more than one hundred acres of land. There is no authority for locations of this size, either in the local laws or congressional enactments.

It has always been the policy of the government—as shown by the statutes providing for the disposal of the public lands containing minerals—to prevent an individual or company from acquiring title to large tracts of mineral land.

To recognize a location of the extent claimed by said company, would be without authority of law, and contrary to its express provisions. This tunnel location can only be recognized to the extent authorized by law, to wit: six feet wide and three thousand feet in length along the course of the said tunnel.

Said adverse claimant filed a plat representing the conflict between said claims, on the same day that said adverse claim was filed, to wit, January 20, 1876. This plat represents that said tunnel, if projected, will intersect the said Slide Lode at the distance of twelve hundred and forty-three and one half feet from the face of the tunnel, and about two hundred and twenty-five feet south-westerly from the discovery shaft on said Slide Lode.

On the fourth of February, a second plat was filed, which is certified to by the same deputy surveyor who certified to the plat filed on the twentieth January. This plat represents the Slide Lode in the same position with reference to said tunnel, that the first plat does, but an evident error appears upon this plat in stating that it is nine hundred and twenty feet from the face of the tunnel to the intersection with said lode.

As before stated, the plats show that the discovery shaft of the Slide Lode is about two hundred and twenty-five feet south-westerly from the point where the tunnel, if projected, will intersect said lode. The papers seem to establish the fact that the Slide Lode is not a blind lode, but one which was discovered from the surface. The law gives to the tun-

nel owner only such lodes as may be *discovered* in such tunnel, and only prevents the location by other parties of lodes upon the *line of such tunnel* "not appearing on the surface."

The adverse claim in this case was sworn to before A. J. Mackey, Deputy Clerk of Boulder, Colorado. The applicants urge that said adverse claim was not verified in accordance with the mining act of May 10, 1872, and the Revised Statutes of the United States. The Revised Statutes of the United States, Section 2335, provides that "all affidavits required to be made under this chapter, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated."

The Hon. Acting Secretary of the Interior, on the twenty-eighth of October, 1873, in the case of Dardanelles Mining Co. v. the California Mining Co., gave a construction to this section of the law and rejected the adverse claim, as the same had been sworn to before a Commissioner of Deeds for Nevada, in the State of California, and not before an officer authorized to administer oaths *within* the land district. This rule was also followed by the Hon. Secretary of the Interior in case of J. H. McMurdy et al. v. E. S. Streeter et al., April 30, 1874.

The adverse claim in this case was not sworn to within the land district, and under the decisions of the head of the department can not operate as a bar to the issuance of a patent upon said application. Said adverse claim is accordingly rejected. You will inform all parties in interest, and acknowledge the receipt hereof.

Very respectfully, your obed't serv't,

J. A. WILLIAMSON, *Commissioner.*

No. 3. Locators of tunnel rights are expected to use reasonable diligence in working and advancing their tunnels.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 1, 1873.

L. S. DAVID, Esq., *Grass Valley, California.*

SIR: In reply to the inquiry in your letter of July 18, 1873, I have to state that locators of tunnels under the act of May 10, 1872, are required to use reasonable diligence

in working and advancing their tunnels; otherwise such tunnel locations are treated as abandoned.

Section 4 of the mining act referred to reads as follows:

"* * * But failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel."

There is no specified amount to be expended to retain the ownership of any tunnel rights.

The act approved March 1, 1873, amending the act of May 10, 1872, only refers to lode claims located prior to the passage of said act of May 10, 1872.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 4. 1. No patent can issue for a vein or lode without surface ground.

2. The survey of a vein or lode discovered in a tunnel can not properly be made until the apex thereof has been ascertained by sinking a shaft or by following it upon its dip from the point of discovery.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 31, 1877.

WM. L. CAMPBELL, Esq., *Surveyor-general, Colorado.*

SIR: In your letter of the seventh instant you inquire how survey shall be made of vein or lode claims discovered in a tunnel.

Section 2323 of the Revised Statutes of the United States provides that the owners of a tunnel run for the development of a vein or lode, or for the discovery of mines "shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface."

Section 2320 Revised Statutes, provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and declares the width of surface ground which may be embraced by a location.

Section 2322 provides that locators, so long as they comply with the laws of the United States and with State,

Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extending downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location; * * * and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Section 2324 requires that all locations "must be distinctly marked on the ground, so that its boundaries can be readily traced."

Section 2325 provides that a patent for any *land* located for valuable deposits may be obtained in the manner therein provided, by any person, association, or corporation authorized to locate a "claim who have claimed and located a piece of land for such purposes." This section also requires the plat and field notes to show "accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground," and makes it the duty of the applicant to post a copy of the plat and notice upon the "land embraced in such plat."

Claim without surface ground—Survey.

From the foregoing provisions of law, it will be seen that no patent can issue for a vein or lode without surface ground, and as the surface which overlies the apex of a vein or lode discovered in a tunnel can only be ascertained by sinking a shaft or following a lode upon its dip from the point of discovery, a survey of a lode of this kind can not be properly made until it has been definitely determined, as above indicated, what portion of the public domain overlies the apex of such lode.

Very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

No. 5. Tunnel locations not patented.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., April 15, 1873.

Gen. GEORGE P. IDRIE, *P. O. Box* 2050, *San Francisco, California.*

SIR: In reply to your letter of the first ultimo, I have to state that there is no provision of law for patenting tunnel locations.

Such lodes, however, as are discovered in running a tunnel, may be patented, upon full compliance with the law.

* * * * * * * * * *

Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner.*

CHAPTER IX.

ANNUAL LABOR.

No. 1. *a.* The statute contemplates no cessation in making annual improvement.
b. Person out of possession can not apply for patent.
No. 2. Large expenditures formerly made will not excuse annual labor.
No. 3. *a.* Same as No. 2.
b. Entry in interest of land officers improper.
No. 4. *a.* Possessory right, provided by section 2324, may continue for indefinite period.
b. Annual expenditures not required after entry made.
Secretary's decision in "American Hill" case.
No. 5. Commissioner's decision in "American Hill" case.
No. 6. Construction of second section of act of January 22, 1880.
No. 7. Same question as No. 6.
No. 8. Proceedings against co-owner. Locators must make the expenditures required by State law in the matter of location. See No. 4, Location.

No. 1. 1. The statute contemplates no cessation of annual improvements until entry is made.

2. No person *out of possession* can apply for patent.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 20, 1879.

Register and Receiver, Central City, Colorado.

GENTLEMEN: The papers in mineral entry No. 1074, lots 298 A and B, made in your office September 18, 1878, by the American Flag Gold Mining Company, upon the American Flag or Bennett lode, Nevada Mining District, Gilpin county, have been examined. The said claim consists of two locations, made August 12, 1861, and October 28, 1861, by Joshua Smith and T. D. Randall, and by R. J. Kilpatrick and T. D. Randall, respectively.

Application for patent was made July 20, 1874, by the American Flag Gold Mining Company, claimants by purchase. Publication was made for ten consecutive weeks, from July 22 to September 23, 1874. Notice and plat were posted on the claim during the full period of publication, and the register certifies to the posting in his office during the same period. In fact, all proof necessary to complete

the right to make entry in the absence of adverse claims was filed before the twentieth of September, 1874.

On the nineteenth of September, 1874, two adverse claims were filed, one by the Colorado Central Gold Mining Company, and the other by James and H. C. Clark. Application for patent was suspended, and suits were commenced within thirty days by these adverse claimants, which were determined at the September, 1878, term of court, four years after their commencement, in favor of the American Flag Gold Mining Company. Certified copies of the judgment rolls were filed in your office September 18, 1878, and thereupon entry of the claim and payment was allowed.

Subsequently, but on the same day, William M. Finlay filed an affidavit protesting against the issuance of patent to the American Flag Gold Mining Company, settting forth that the said company, for more than one year next preceding the twenty-seventh day of May, 1876, had "failed and entirely neglected to make any improvement, or do any work on said property as required by law, and left said property open to relocation and occupation;" that on the twenty-seventh day of May, 1876, finding the property thus abandoned, he entered upon and took possession of said claim, relocated it, sunk a shaft more than ten feet deep, and on the thirtieth of May filed a copy of his relocation notice in the office of the county clerk of Gilpin county, a certified copy of which notice is made a part of his affidavit; that since the twenty-seventh day of May, 1876, he had continued in quiet possession of the claim, and had expended more than eight hundred dollars thereon for improvements and labor. He asks that the entry of the American Flag Gold Mining Company be canceled, and a hearing ordered relative to the failure of said company to make the expenditures on the claim required by law, and to his relocation.

On the twenty-first of September, 1878, the company filed affidavits to show that sufficient expenditures had been made by it during the time in which abandonment is alleged to hold its possession of the premises, and that it had held continuous possession of the same. One of the affiants further testified that the alleged relocation by Finlay was made by working under the American Flag claim from a shaft sunk without its surface boundaries; and that the

affiant had held a conversation with the attorney of Finlay, who had told him that Finlay's relocation was made at the instance of the Clarks, parties to one of the suits then pending in the courts against this claim.

There is no question that up to the date of publication of notice the American Flag Gold Mining Company was the rightful holder of this claim. It has maintained this successfully in the courts, but the judgment of the court necessarily related to matters precedent to the application for patent, and extended to nothing subsequent, and such prior right was the only thing in issue.

Out of possession.

The statute contemplates no interruption of the annual improvements until entry and payment of purchase money. No person who is *out of possession* can apply for patent, and no one in possession can maintain it, only in the prescribed manner. While the statute prescribes one way in which this possession must be maintained, it excludes every other.

By the statutory requirement, the first annual expenditure on this claim should have been made by January 1, 1875, and prior to that date was not subject to relocation; hence, if said company made its annual expenditure by said date, the claim was not subject to relocation prior to January 1, 1876, as the company had the entire year of 1875 in which to make the next annual expenditure; and if such expenditures were made for the year ending December 31, 1875, or, if not so made, but prior to May 27, 1876, the company by its agents resumed work, the claim was not subject to the relocation of Finlay.

A hearing is hereby ordered to determine the facts. Notify parties accordingly, etc.

J. M. ARMSTRONG, *Acting Commissioner.*

No. 2. The fact that large expenditures *have been* made upon a mining claim, does not excuse the claimant from the necessity of performing the required *annual* labor.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 13, 1877.

WM. S. MERRELL, Esq., *Cincinnati, Ohio.*

SIR: Referring to your letter of the third instant I have to state that the Revised Statutes of the United States—

section 2324—requires an *annual* expenditure to be made upon each mining claim to entitle the claimants to hold the same. The act of Congress approved February 11, 1875, provides that money expended in running a tunnel to develop one or more lodes, shall be considered as work done upon those lodes.

The fact that a large expenditure has been made upon a claim in the past will not relieve a claimant from the necessity of performing the required *annual* labor.*

Very respectfully, your obd't servant,

J. A. WILLIAMSON, *Commissioner.*

No. 3. DEL NORTE LODE.

1. Entry of mine in the interest of receiver of district land office improper.
2. In estimating the five hundred dollars expenditures, essential to authorize entry, improvements made by former locators who had abandoned can not be included.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., June 23, 1879.

SIR: On April 24, 1875, Andrew M. Embry made application for patent for one thousand five hundred feet on the Del Norte lode, Central City land district, Colorado, and made entry of the same on August 22, 1876, per mineral entry No. 782. On March 27, 1878, William H. Morgan filed affidavits in your office alleging that neither the applicant for patent nor his grantors had made the expenditures on said lode required by law to entitle him to a patent, and that the expenditures made by said applicant and his grantors did not exceed in value the sum of twenty dollars. On April 9, 1878, you ordered a hearing to determine the value of improvements made on said lode, by whom and when made, and the testimony was taken before the clerk of the district court of Gilpin county, Colorado, in June, 1878. On December 20, 1878, you decided that neither the applicant nor his grantors had made the necessary expenditures on the mine to entitle him to a patent, and you accordingly held his entry for cancellation, and he has appealed from your decision.

* *District Rules—Conditions subsequent.*—The rules and customs of miners that require locators to do a certain amount of work upon their claims are conditions subsequent, and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs: King v. Edwards, 1 Mont. 235.

The proofs in this case show that the application for patent is based on a location made on January 1, 1876, by Edward W. Henderson (Receiver of the Land Office) and Robert B. Smock. The abstract of title shows that on February 29, 1876, Smock conveyed his interest in the mine to Henderson, and Henderson deeded the mine to Andrew Embry on April 1, 1876.

Smock testified at the trial that he transferred his interest in the mine to Henderson for the purpose of facilitating the procurement of a patent, and Henderson testified that he was Receiver of the Land Office; he doubted the propriety of making the entry in his own name, and therefore conveyed to Embry, and that Embry was really acting as trustee for himself and Smock, and that they were the actual owners of the mine.

The testimony shows, and is admitted by Henderson, that no improvements were made on the mine between the date of location and the date of entry.

On January 2, 1878, Embry, with the knowledge and consent of Henderson and Smock, leased the mine to Daniel R. Miller, who appears to have subsequently done about twenty dollars' worth of work upon it. Smock was a witness for Embry when he made his final proof and entry, and testified that the improvements made by Embry and his grantors on the Del Norte were worth not less than five hundred dollars, and that he (Smock) owned no interest whatever in said property—statements which were wholly untrue. The testimony in this case shows clearly:

First. That the conveyances from Smock to Henderson and from Henderson to Embry were fraudulent.

Second. That in the entry of this mine by the receiver of the local land office, through his agent Embry, that officer was guilty of a direct violation of the order of this department of August 3, 1876, and the instructions of your office of August 23, 1876.

Third. That the affidavit of Smock dated April 24, 1876, wherein he stated that five hundred dollars' worth of improvements had been made on the Del Norte lode by Embry and his grantors, and that he owned no interest in the property, was false, and the entry was therefore based upon fraudulent proof, in so far as relates to the value of the improvements made on this lode.

Fourth. That the statement of the deputy surveyor, contained in the field notes of survey, that five hundred dollars' worth of improvements had been made on the Del Norte lode by the claimant and his grantors, was untrue, although not intentionally so, as the deputy inadvertently included in his field notes the improvements which had been made by other parties under locations which had been abandoned.

Fifth. That neither the applicant nor his grantors had done any work or made any improvements on the Del Norte lode between the date of location and the date of entry thereof, and that the entry is therefore illegal.

On the trial of this case testimony was introduced to the effect that more than five hundred dollars' worth of work had been done on this lode some years ago when it was claimed by various parties under former locations, and was known as the "Jones lode," and "Doubloon lode," which said locations had been abandoned long prior to the time the Del Norte location was made. It was also shown that Smock had some years ago purchased an interest in the abandoned Jones lode, and it is sought to make the work done on the abandoned Jones location available as improvements made on the Del Norte lode in the disposition of this case.

With reference to this question it is only necessary to say that the Jones lode having been abandoned, and the claim relocated under section two thousand three hundred and twenty-four of the Revised Statutes, all rights which had been acquired by the location and improvements of the Jones lode were lost by abandonment of that lode, and no person, no matter what his relations may have been to the old location, can now claim any benefits arising from improvements made on it prior to abandonment. The claim of the applicants is based upon the location of January 1, 1876, and as it is clearly shown that the law had not been complied with, and that the entry was allowed on false and fraudulent proofs, there is no error in your decision holding it for cancellation.

Your decision is affirmed, and the papers transmitted with your letter of April 12, 1870, are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary*.

The Commissioner of the General Land Office.

No. 4. AMERICAN HILL QUARTZ MINE.

1. The possessory right provided by section 2324, Revised Statutes, may continue for an indefinite term of years, and can only be terminated by a failure of claimant to comply with the statute, and an assertion of claim by another. There is nothing in the law which requires the party in possession to purchase the land from the government.

2. The validity of an entry is made to depend upon the facts existing at the time it is made, and not upon anything which the claimant may do, or omit to do, afterwards.

An entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned, and within the meaning and intent of section 2324, Revised Statutes.

After entry, the claim is not subject to relocation for abandonment or failure to make annual expenditures.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 4, 1879.

SIR: I have considered the case of Clarence Smith and F. W. Clute v. Peter Vanclief, Charles Heintzen, and John C. Young, involving the right to lots 37, 38, and 39, township 19 north, range 11 east, M. D. M., Sierra mining district, Sacramento land district, California.

The facts relative to this case are as follows: On June 1, 1877, Vanclief, Heintzen, and Young made application for patent for the American Hill Quartz Mine, situated in township 19 north, range 11 east, M. D. M. (in the certificate and receipt erroneously described as range 9 east), and described by the official survey thereof, made by Deputy Surveyor Charles W. Hendel, in November, 1876, as lots 37, 38, and 39, containing two thousand two hundred and eighty-eight and twenty-two hundredths feet in length by two hundred and fifty feet in width on each side of the lode. No adverse claim was filed during the period of publication, and an entry was allowed and patent certificate issued in the name of said parties on January 16, 1878. After said entry was made, viz., on April 28, 1878, Clarence Smith claims to have relocated lots 38 and 39, and F. W. Clute claims to have relocated lot 37, pursuant to the provisions of section 2324 of the Revised Statutes of the United States; and it is alleged on behalf of said relocators that no labor was performed or improvements made on said claims by Vanclief et al. on January 1, 1875, nor at any time subsequent thereto, until April 28, 1878, when said relocators entered thereon and ascertained that a lode,

ledge, or vein of gold-bearing quartz existed therein, whereupon they relocated and claimed the same, and gave notice of their said relocation and claim in the manner required by law. Said relators, therefore, ask to have the application for patent of Vanclief et al. dismissed, and for such other and further relief as the circumstances of the case demand.

By your decision of September 26, 1878, the relocations of Smith and Clute were adjudged to be illegal and void, and their applications for recognition were dismissed.

In this decision you confined the scope of your inquiry to the consideration of the legal rights of Smith and Clute as relocators, and did not pass upon the merits or regularity of the entry of Vanclief et al., but left all questions relating to the regularity of said entry for examination and adjustment when the entry was reached and examined on its merits in its regular order.

In this there was no error.

Messrs. Smith and Clute have attempted to relocate a mining claim which has been entered and paid for, with full knowledge of the existence of the entry, and the theory of their case is, that they have a legal right to relocate a claim at any time prior to the issuance of patent, or failure of the parties making the entry to perform the necessary labor and make the necessary improvements thereon.

If the theory of the relocators is correct on this point, they have a standing as parties in interest for the purposes of this case, and it is not material whether the entry of Vanclief et al. was regular or irregular; but in so far as they seek to attack the regularity of the entry, and to contest matters arising prior to the time it was made, their *status* is that of protestants only, and they could have no right of appeal from your decision in any event.

As it would be bad practice for this department to take original jurisdiction over matters not involved in your decision, and not subject to appeal if they were involved, the questions relating to the regularity of the entry made by Vanclief et al. will not be considered.

That part of the statute under which the relocators claim, which is material to the consideration of this case, is in the following words, viz.:

"SECTION 2324. * * * On each claim located after the tenth of May, eighteen hundred and seventy-two, *and until a patent has been issued therefor*, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein *until a patent has been issued therefor;* but when such claims are held in common, such expenditure may be made upon any one claim, *and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made,* provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location." * * *

By act approved June 6, 1874 (18 Stat. 61), the time within which the first annual expenditure is required to be made on claims located *prior* to May 10, 1872, was extended to January 1, 1875.

Relocation of entered claim.

This case, therefore, presents the naked question of law whether or not after a mining claim has been entered and paid for it is subject to relocation by strangers between the date of entry and the date on which a patent is issued, in the event that the persons making the entry fail to perform the labor or to make the improvements required by section 2324 of the Revised Statutes of the United States. It has already been stated that this inquiry would be confined to events occurring subsequently to the date of the entry of Vanclief et al.

The proofs presented by Messrs. Smith and Clute show that no work was performed or improvements made by Vanclief et al. between January 16, 1878, the date of entry, and April 28, 1878, the date of the alleged relocation.

Admitting, for the purposes of the argument, that a mine can be relocated after entry, it is manifest that such relocation can only be made after forfeiture; and as no forfeiture

can take place until one year after entry, it is clear that the proofs presented in this case are insufficient, and the relocation premature. On their own construction of the law Messrs. Smith and Clute could have acquired no right to relocate this mine prior to January 17, 1879, and then only in the event that Vanclief et al. should fail to improve it during the year subsequent to entry.

The consideration of this case might well be closed at this point, but as I think the interests of the government and those of mining claimants demand that the legal question should be disposed of in so far as lies within the power of this department to do so, I deem it proper to proceed with the consideration of the question.

Classes of titles.

At the outset it is proper to remark that by the mining laws of the United States three distinct classes of titles are created, viz.: 1. Title in fee simple; 2. Title by possession; 3. The complete equitable title. The first vests in the grantee of the government an indefeasible title, while the second vests a title in the nature of an easement only. The first, being an absolute grant by purchase and patent without condition, is not defeasible, while the second, being a mere right of possession and enjoyment of profits without purchase and upon condition, may be defeated at any time by the failure of the party in possession to comply with the condition, viz., to perform the labor or make the annual improvements required by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued. (Stark v. Starrs, 6 Wall. 418.)

Section 2324 Revised Statutes has reference solely to titles by right of possession, and does not in any way conflict with titles acquired by purchase, for in the latter case both must be in one and the same person. A title by right of possession is the lowest grade of title known to the mining laws; the next is the equitable title which accrues upon purchase and entry; while the third and final grade is the fee simple, which is acquired by patent evidencing the legal title, and merging therein both the possessory and equitable titles.

Where lands are acquired under the pre-emption laws, it sometimes occurs that the legal title may be in one person and a superior equity in another; but this can not occur under the operation of the mining laws, for all legal and equitable adverse titles and claims must be presented to and passed upon by the courts prior to the issuance of patent, or be considered as stale and abandoned.

This question was expressly decided by Mr. Justice Field in the case of the Eureka Mining Company v. Richmond Mining Company. (4 Sawyer C. C. Rep. 318.)

Possessory right.

The possessory right provided for by section 2324 Revised Statutes may continue for an indefinite term of years, and can only be terminated by a failure of the claimant to comply with the terms of the statute and an assertion of claim to the land by another; but there is nothing in the law which requires a party in possession to purchase the land from the government, and if he complies with the law relating to possessory rights, his title for all practical purposes is as good as though it were secured by patent.*

Section 2324 provides in terms that a possessory claim may be relocated at any time prior to the issuance of patent if the necessary labor or improvements shall be neglected for one year, but "a person ought not to think, if he have the letter on his side, that he hath the law in all cases." (Plowden.) "No statute shall be interpreted so as to be inconvenient or against reason." (Cawdrie's case, 5 Rep.) "The words of a statute ought not to be expounded to destroy natural justice." (Story, 81.)

The purpose of this requirement of the law was to obviate an abuse which had assumed formidable proportions in the mining regions. In the early history of mining operations in this country it was the universal practice of miners to assemble together and make laws for the govern-

* *Possessory claimant not bound to go to patent.*—Under the mining laws of the United States the locator of a mining claim becomes the assignee of the United States, and so long as he complies with the conditions imposed by them, and the license to occupy remains in force, the right of the locator to the possession of the land, and to appropriate to his own use the minerals therein, is full and complete, and he need not take any step to purchase the same, or go to patent unless he think proper. Chapman v. Toy Long, 4 Saw. 28; Wolfly v. Lebanon M. Co., 4 Col. —.

ment of the mining district where they resided. These laws were generally very liberal in the matter of possessory rights and titles, and great areas of land were covered by duly recorded mining claims upon which no work had been done or improvements made for a long series of years.

Under the rulings of the local courts, these claims operated as a cloud upon the title to the land, and retarded the progress and development of the mining industries of the country. In order, therefore, to put an end to this abuse and encourage the purchase of the lands from the government, and the consequent establishment of permanent industries, Congress wisely provided that possessory rights should exist only so long as the specified amount of work was annually performed. The object of the law being to encourage the purchase of mineral lands, it would be manifestly improper for this department to so construe the law as to destroy the purpose which Congress had in view in enacting it.

Validity of entry.

The mining laws require certain acts, in the nature of conditions precedent, to be performed before an entry is made, and the validity of the entry is made to depend upon the facts existing at the time it is made and not upon anything which the claimant may do or omit to do afterwards.

These precedent requirements are specifically set out in section 2325 Revised Statutes, and it is made your duty in the regular order of business to see that they have been complied with, and thereupon to issue a patent for the mine in accordance with the calls of the location and entry; yet it seldom occurs, owing to the great number of mining entries allowed and the gravity of the questions involved, that an entry can be examined and patented until months, and sometimes years, after it is made. The law does not fix any period of time on which a patent *shall issue*, and indeed it would be impossible for this to be done; yet if the position of the relocators is correct, the vested rights of the purchaser may be destroyed and his valuable improvements taken by a stranger on account of official delay in the issuance of the patent for which he is in no wise responsible. Such a construction would, in my opinion, be repugnant to the intent of the statute.

The true rule of law governing entries of the public land, to which mineral lands form no exception, is that, when the contract of purchase is completed by the payment of the purchase money and the issuance of the patent certificate by the authorized agents of the government, the purchaser at once acquires a vested interest in the land, of which he can not be subsequently deprived if he has complied with the requirements of the law prior to entry, and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In such cases there is part performance of a contract of sale, which entitles the purchaser to a specific performance of the whole contract without further action on his part. When the proofs are made, and the purchase money paid, the equitable title of the purchaser is complete, and the patent when issued is evidence of the regularity of the previous acts, and relates to the date of the entry, to the exclusion of all intervening claims. In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned.

In support of these views, I cite the following adjudicated cases: Carroll v. Safford, 3 Howard, 441; Landes v. Brant, 10 Howard, 348; Lessees of French et al. v. Spencer et al., 21 Howard, 240; Witherspoon v. Duncan, 4 Wallace, 210; Stark v. Starrs, 6 Wallace, 418; Whitney v. Frisbie, 9 Wallace, 187; Irvine v. Irvine, 9 Wallace, 617; Barney v. Doepl (October term, 1878, U. S. Supreme Court); Cruise on Real Property, vol. 5, pp. 510, 511.

As the doctrine is firmly established that where several concurrent acts are necessary to make a conveyance, the original act shall be preferred, and all subsequent acts shall have relation to it, it is held that an entry made is equivalent to a patent issued, within the meaning and intent of section 2324 of the Revised Statates. The attempted relocation of the tract in question by Messrs. Smith and Clute was void at its inception, and was properly rejected.

Your decision is affirmed for the reason stated, and the papers transmitted with your letter of the third ultimo are herewith returned. Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 5. LAND OFFICE.

Commissioner's decision in the American Hill case.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 26, 1878.

Register and Receiver, Sacramento, Cal.

GENTLEMEN: On the sixteenth of January, 1878, Peter Vanclief, Charles Heintzen, and John C. Young made entry at your office of the "American Hill Quartz mine," embracing lots 37, 38, and 39, in township 19 north, 11 east, M. D. M. (in the certificate and receipt erroneously described as 9 east), in the Sierra mining district, Sierra County, California. The said claim consists of a consolidation of three original locations, one of twelve hundred feet, made by the American Hill Quartz Company, July 26, 1856; one of eight hundred feet, by Darling & Co., October 12, 1857; and one of five hundred feet, by Spangler et al., made December 17, 1859. The claim applied for is two thousand two hundred and eighty-eight and twenty-two hundredths feet in length, by two hundred and fifty feet in width, on each side the lode. Of this mine Vanclief claims as owner of two thirds, Heintzen one sixth, and Young one sixth.

Application for patent was filed in your office June 1, 1877. Publication was made in the Mountain Messenger, a weekly newspaper published at Downieville, Sierra County, California, commencing June 16, 1877, and ending August 18, 1877. Notice and plat were posted on *each* location, to wit, American Hill claim, Spangler claim, and Darling claim, May 23, 1877, and remained so posted to September 25, 1877. The Register certifies to the posting at his office from June 5, 1877, to January 26, 1878. No adverse claim was filed, and payment was made January 16, 1878, entry allowed, and patent certificate issued. On the nineteenth of January, 1878, the entry papers were transmitted to this office.

The area of said claim appears to be that allowed by the district mining laws, and not in excess of that allowed by the laws of the United States. There are some matters in the claim which will require adjustment before a final dis-

position of the entry, should it be decided legal in respect to the points now under consideration.

At present I shall only consider the merits of the pending controversy, which consists of the intervention and claim of Clarence Smith as relocator of the Darling and Spangler mines, to wit, lots 38 and 39, and of F. W. Clute, as relocator of the American Hill mine, lot 37. Said relocations were made April 28, 1878.

Questions decided.

In behalf of said relocations it is alleged, under oath, that there was no labor performed or improvements made upon said claim on January 1, 1875, nor subsequent thereto until April 28, 1878, when said relocators entered upon said claims, explored the same, and ascertained that a lode, ledge, or vein of gold-bearing quartz deposited therein, whereupon they relocated and claimed the same, posted notices, and caused the same to be recorded in the office of County Recorder, and said relocators ask an order dismissing the application of Vanclief et al. for patent, and such other orders and rulings herein as may be required and mentioned by the laws and regulations in cases of this character. The questions that arise for immediate decision are: 1. Is a mining claim subject to relocation subsequent to entry of the same; and, 2. Does a failure to perform that labor, or make the improvements required by section 2324 Revised Statutes of the United States, between date of entry and the delivery of patent, work a forfeiture of all rights acquired by entry and demand cancellation of the same, when such failure is brought to the attention of this office by such relocation or otherwise?

Lands disposed of.

On the first point, I quote from the decision of the Supreme Court of the United States in case of Carroll v. Safford, 3 How. 441, referred to by counsel for Vanclief et al. "Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the right of the purchaser is concerned they are protected under the patent certificate as fully as under a patent. Suppose the officers of the gov-

ernment had sold a tract of land, received the purchase-money, and issued a patent certificate; can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser, and any second purchaser would take the land charged with the trust."

In Witherspoon v. Duncan, 4 Wallace, 210, the Supreme Court say: "According to the well-known mode of proceeding at the Land Office (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the Receiver gives him a certificate of entry, reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make a proper conveyance as soon as it can, and in the mean time holds the naked legal fee in trust for the purchaser, who has the equitable title." Referring to donation and cash entry: "In either case, when the entry is made and certificate given, the particular land is segregated from the mass of public lands and becomes private property. In the one case the entry is complete when the money is paid, and in the other when the required proofs are furnished. In neither case can the patent be withheld if the original entry was lawful."

In Stark v. Starrs, 6 Wallace, 402, the court say: "The right to a patent once vested is treated by the government when dealing with the public lands as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."

In Hutchings v. Low, 15 Wallace, 77, the court say: "That under the pre-emption laws, mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any rights in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the

power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived."

The principle thus declared by the Supreme Court has uniformly been respected by the executive departments. Whenever an entry has been made in the district land office, no adverse claim can be initiated by a third party until the entry shall have been canceled in such office. This rule is enforced almost daily in the administration of this and the local land offices, and is too well established to admit of question. I find no authority in the mineral laws of the United States, direct or inferential, to a different intent on this point. Section 2324, Revised Statutes, so far as it declares mineral land subject to location on failure of the original locator or owner to make the specified annual expenditures, contemplates, in my opinion, only the period prior to entry. This section deals only with possessory titles. When entry has been made, purchase-money paid, and a patent certificate issued, the purchaser has a higher title than that of mere rightful possession, and with that title this section can not be reasonably construed to interfere. The land entered is withdrawn from the body of the public lands and all incidents thereto pertaining. The provisions subsequent to section 2324 preclude even the assertion of an adverse claim of prior inception after entry; and much less could a new claim be initiated. Such being the status of the land under the laws of the United States, it is obvious that a relocation after entry can not derive authority from the laws of any State, Territory, or locality. I therefore conclude that there can be no valid relocation of a mineral claim subsequent to its entry in the local land office. On the second point, does a failure to perform the labor or make the improvements required by section 2324, Revised Statutes, between date of entry and delivery of patent, work a forfeiture of all rights acquired by entry, and demand cancellation of the same when such failure is brought

to the attention of this office by such relocation or otherwise? I think not. The interveners in this case seem to rely upon the language of section 2324, where it requires certain annual expenditures on each claim "until a patent has been issued therefor."

For the purposes of this case the mining laws of the United States may be divided into two parts: 1. That granting, on certain conditions, the right of use and possession; 2. That providing for purchase and sale of the fee.

Section 2324 provides for the right of possession without purchase.

A mere possessory title is subject to be defeated on failure to make the specified annual expenditures by a location of another party. This is the scope of the provision; nothing else is named therein; nothing else is evidently contemplated.

The mining laws nowhere compel a party to purchase either the mine or the surface ground from the government. They give the right of exploration and occupation; perpetuity of possession, without purchase, is dependent upon a compliance with certain requirements and the failure by any qualified party to relocate during a period of legal abandonment. It is important to note that a mere failure to make the annual improvements does not of itself conclude the possessory right. A mere resumption of work prior to relocation, by the party in default, his heirs, assigns, or legal representatives, prevents relocation. The law, while necessarily establishing a condition on which the possessory title shall be supported, and on failure of which the possession shall be liable to be defeated, evidently permits a sacrifice of interests and investments with extreme reluctance, and only enforces a forfeiture when, after failure is complete, another party duly qualified initiates a legal claim during the period of actual abandonment.

The necessity for annual expenditures continues, *not* for a particular term of years; *not* for a period equal to that prescribed by the statutes of limitation of the State in which the mine is situated, but until the owner of the possession shall become the owner of the property. And it was this point of time which Congress sought to mark by the words of limitation employed.

In the execution of all prior laws relating to land patents, the date when a party who, having fulfilled the requirements of law, submitted his final proof thereof, paid the purchase money, and received his patent certificate, has with great uniformity been held by the Supreme Court of the United States to be when he acquired a vested right in the land of which he could not be divested except by the exercise of the right of eminent domain. (See case of Hutchings v. Low, above quoted.) This point of time has been regarded as the date when the right of property left the government and rested in him.

The land, therefore, exempt from taxation and execution became at once thereafter subject to all the incidents of a fee simple under the State laws. He could deal with it in all respects as his own. He might make final proof and pay for his pre-emption claim, and at once thereafter initiate a claim by entry under the homestead laws. He could sell or abandon it for any reason as soon as his entry was completed, and the acts constituted no basis for official inquiry, because the right of property was *in him* and the United States *had no right* to control his use. He was the absolute equitable owner, and the necessary delay in the preparation and delivering of patent has never been held to abridge his rights or increase his duties. It is hardly to be presumed that Congress, having in mind this familiar doctrine, than which no other is perhaps better established or known, and having the evident intent of requiring an annual expenditure, to support an annual possession for that period only while the claim should be held by a possessory title, intended by an expression, used unquestionably to mark the date of a change of ownership, to impose the extraordinary condition which is substantially claimed by the interveners in this case. Had such been their intention, it is not unreasonable to believe they would have declared in terms that the annual expenditures could not be suspended upon entry and issue of patent certificate, but must be continued until actual delivery of the patent itself. It is my opinion that the language actually employed was used simply to emphasize the legislative intent that said expenditures could be dispensed with for *no* reason, even when the possession might otherwise be protected by the State statute of limita-

tion, or by local rule or custom, except that of change of ownership, of which the patent certificate is legal evidence until delivery of patent itself at the convenience of the government.

I find additional reasons for this conclusion in section 2325 Revised Statutes, which, leaving the question of what will support a good possessory title, proceeds to declare the conditions on which the property can be purchased and patent obtained. Among the requirements an official survey accurately locating the claim, a notice of the application by publication and posting on the land and in the local office for sixty days, record proof of the possessory title, and the certificate of the Surveyor-general that the gross amount of five hundred dollars has been expended in labor or improvement on the claims are necessary. The notice is in three different methods given to the world; it is sought to reach every one who by possibility may have adverse interests; and the adverse claimant, whatever his interests, is estopped if his claim is not filed within the specified period of publication, and patent issues to the applicant. The proof as to expenditures does not in terms or constructively refer to *annual* improvements; they are incident to the *possessory* title.

The value of the improvements placed upon the claim by the applicant or his grantor must be five hundred dollars. When, is not material. After publication, etc., if there has been no adverse claim presented, if the *record* shows that he has the possessory title, and he is then in actual possession, he may purchase the land, "and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." As the condition of annual expenditures is included in the chapter, it is argued that a patent can not legally issue if it be shown that such expenditures have not been made. I think this clause refers clearly to those conditions only which are essential to the right of *purchase*. To illustrate: A., either by location or purchase of possessory title, becomes the proprietor of a mine; he expends thereon in labor and improvements the sum of one hundred thousand dollars; he then fails to make any expenditures whatever upon it for the term of

three years; but before any other party relocates it, he resumes work and immediately applies for a patent. Under those circumstances he is clearly entitled to enter and receive patent. The mine can not be relocated, because he has resumed work; he has made the required expenditure of five hundred dollars; for the reasons indicated in the first part of this decision, the mine can not be relocated *after* entry; no proof of having kept up the annual expenditures was a condition of entry; much less, then, can it be held to be a condition to be performed after entry, and the "terms" of the chapter relating to annual expenditures refers solely to the possessory title, which has *legally* been merged into the right of property, of which the Supreme Court say, in case of Hutchings v. Low, before quoted, Congress itself has no power to dispossess him.

I can conceive of no reason derived from considerations of public policy or justice why, after entry, when even those who may have valuable interests are excluded, another party, who for the first time sees the mine, should be permitted to defeat the entry with all its established equities. Vested rights can not be annihilated on doubtful constructions of laws; and whatever power Congress may have had to make annual expenditures prior to entry a condition of of entry, or annual expenditures after entry a condition of patent, it is clear to me that it did not do so, and that, as above stated, the "terms" of the chapter with which compliance must be shown in order to support an entry were such, and such only, as related to the conditions of *purchase*, and not those which were merely conditions of *possession*, without purchase. This construction of law, it will be seen, in no manner invites or excuses negligence in the matter of developing the mine to the extent of the expenditures named in the law. The owner of the possessory title neglects his labor and improvements at his own risk so long as such title exists alone; but so startling a proposition as that Congress intended to sacrifice, to the benefit of parties having no interests or equities whatever, the vast values and improvements often existing in mining property, solely because of a failure, *after purchase and possession* are completed and perfected, to perform an act of improvement which is *not* a condition of purchase, but

refers only to the possession without purchase, I can not believe nor can I perceive that the language of the statute warrants such a conclusion.

I conclude that the attempted relocations by Clarence Smith and F. W. Clute were illegal and void, and that their application for recognition be dismissed. The entry of Vanclief et al. will be examined in its order and disposed of on its merits.

Give due notice hereof to all parties in interest, allow sixty days for appeal, and on the expiration of that period make report to this office.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 6. Construction of the act of January 22, 1880.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 1, 1880.

H. N. COPP, Esq.

SIR: I am in receipt of your letter of seventeenth ultimo, referring to the question of relocating mines under the law of January 22, 1880, and asking the following questions:

Questions decided.

"1. When does a mine located February 1, 1880, become subject to relocation?

"2. When does a mine located April 8, 1875, on which the annual work has heretofore been promptly done, and improvements made, become subject to relocation; provided no work has so far been done since April 8, 1879?"

The second section of the act to which you refer is as follows: * * * "*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May A. D. 1872.

* See No. 12, Laws. Where the law requires a certain amount of labor to be performed "within one year," the locator has until the year expires to perform such labor. And a party who enters upon his claim after the other acts of location are performed, but before the expiration of such year, is a trespasser. Atkins v. Hendree, I Ida. 108; Chapman v. Toy Long, 4 Sawyer, 35.

Calendar year.

It will be perceived that said law seeks to fix the calendar year as the uniform period within which the annual improvements, required by R. S., sec. 2324, must be made, and as locations are made at different dates through the year, the first annual expenditures are made due within one year from a common date, to wit: The first of January next following the location; thereafter they become due with the expiration of each calendar year.

Hence the first annual expenditures upon a claim located February 1, 1880, become due at the expiration of one year from January 1, 1881, to wit, January 1, 1882, on which day the claim becomes subject to adverse location if the improvements are not made.

In order to apply the law to a claim located April 8, 1875, it is necessary to calculate from the date of location, as there is no other provision for its application, and it is retroactive, and embraces all unpatented claims located since May 10, 1872. The first expenditures upon this location are, therefore, to be reckoned as due within one year from January 1, 1876, to wit, January 1, 1877, and *annually thereafter by the calendar year.*" It follows that if the annual expenditures were made each *calendar year*, or within the calendar year 1879, the claim is not subject to relocation, and will become so subject only upon the expiration of 1880, and a failure of expenditures for that year. If no expenditures were made in the calendar year 1879, or since, the claim is now subject to adverse location.

J. A. WILLIAMSON, *Commissioner.*

No. 7. On a claim located in 1879, the first annual expenditure must be made *during* the year 1880. Work performed after location and prior to January 1, 1880, will not be considered as a part of the first year's assessment.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 10, 1880.

Hon. N. P. HILL, *Denver, Colorado.*

SIR: I have the honor to return herewith the letter of G. A. Haynes, inclosed in yours of twenty-fifth ultimo.

The question submitted by Mr. Haynes is as follows: "If

I locate a mining claim on the first day of October, 1879, and complete the assessment or discovery shaft by the tenth day of October, 1879, and proceed immediately to do one hundred dollars' worth of work *in addition* to the assessment or discovery shaft work, and complete the said one hundred dollars' worth of work by the twentieth day of October, 1879, will the department authorities recognize said one hundred dollars' worth of work as the *first annual* work under the act approved January 22, 1880?"

Section two, of the act of January 22, 1880, is as follows: "That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: '*Provided*, That the period within which the work required to be done annually, on all unpatented mineral claims, shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, A. D. eighteen hundred and seventy-two.'"

The act of May 10, 1872 (section twenty-three hundred and twenty-four, Revised Statutes), provided that "on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

Under said section twenty-three hundred and twenty-four, said annual improvements were due within each year, commencing with the date of location.

Upon claims located prior to May 10, 1872, the first annual expenditures were due by January 1, 1875, and annually thereafter.

The purpose of the amendment of January 22, 1880, was to secure an uniform period within which the annual expenditures should be required on all locations.

In said amendatory act such period is made to "*commence* on the first day of January succeeding the date of location of such claim."

Annual expenditure to be made in the calendar year.

It therefore follows that a claim located October 1, 1879, requires the expenditure of one hundred dollars' worth of

labor or improvements thereon within the calendar year 1880; and that whatever may have been expended during the year 1879 will not answer the requirements of expenditures in 1880.

A claim located on any date subsequent to the first day of January, 1879, requires no further expenditures during the remainder of that year than is made necessary by local laws. I find that I have inadvertently signed a letter* indicating a different construction of the section aforesaid.

The conclusion herein given has, however, been reached after careful consideration and will control my official action. Very respectfully,

Your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

No. 8. Proceedings necessary under section 2324, United States Revised Statutes, as against co-owner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 9, 1877.

D. P. WHEDON, Esq., *Silver Reef, Utah.*

SIR: Referring to your letter of the twenty-eighth ultimo, I have to state that where a party proceeds against one or more of his co-owners, under section twenty-three hundred and twenty-four of the Revised Statutes of the United States, he should file with his application for patent a copy of the original notice of location; an abstract of all conveyances made of the claim; a copy of the notice published to delinquent co-owners, which notice should embrace the names of all delinquents, to which must be attached the affidavit of the publishers of the paper in which the notice was inserted that the attached notice was published for the period of ninety consecutive days, giving dates; the affidavit of the claimant or claimants who have made the required expenditures, corroborated by the sworn statement of two or more disinterested witnesses, showing the character and extent of the improvements made upon the claim, and the time when such improvements were made.

There must also be filed the sworn statement of the

* See No. 4, Location.

claimant or claimants, who had made the required expenditures, as to whether or not either of the parties whose names appear in such published notice contributed his proportion of the required expenditure, either during the ninety days notice by publication or the succeeding ninety days.

The evidence must be full, positive, and explicit upon all these points. Very respectfully,

Your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

CHAPTER X.

COAL LANDS.

No. 1. The coal land laws relate to every variety of coal.
No. 2. *a.* Section 2347 Revised Statutes provides for entry of coal land at private entry.
b. But one declarative statement by the same party.
c. Coal is a mineral.
No. 3. *a.* Form of declarative statement by incorporated company.
b. Secretary to file affidavit stating personal qualification of stockholders.
c. Land not contiguous.
No. 4. Coal land within limits of the grant to the Union Pacific Railroad.
No. 5. Sections 16 and 36 containing valuable deposits of coal do not pass to State.
No. 6. Coal land to be withheld from public offering.

No. 1. The act of March 3, 1873,* providing for the sale of coal lands, relates to lands containing any variety of coal, whether anthracite, bituminous, lignite, or cannel.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 25, 1880.

Register and Receiver, Bismarck, Dakota.

GENTLEMEN: I am in receipt of Register's letter of sixth instant, in which the question is asked: "Is *lignite* coal, and does the land containing the same come within the provisions of the act of Congress approved March 3, 1873, entitled 'An Act to provide for the sale of the lands of the United States containing coal'?"

Lignite is defined to be "mineral coal retaining the texture of the wood from which it was formed, and burning with an empyreumatic odor. It is of more recent origin than the anthracite bituminous coal of the proper coal series." (Webster's Dictionary.)

Furthermore, all of the known coal deposits west of the Missouri river are *lignite,* so far as I have been able to ascertain, and I think there can be no question but that the act relates to all lands containing any variety of coal, whether anthracite, bituminous, lignite, or cannel.

Very respectfully,
J. A. WILLIAMSON, *Commissioner.*

* Sections 2347-2352, Revised Statutes. See No. 2, Laws.

No. 2. 1. Section 2347, U. S. Revised Statutes, provides for the sale of coal land at ordinary private entry.

2. Under section 2350, but one *declaratory statement* can be filed by the same person.

3. Coal is a mineral.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., January 30, 1878.

SIR: I have considered the case of James B. McKean v. David E. Buell and the Union Pacific Railroad Company, involving certain lands in Township 2 North, Range 5 East, Salt Lake City, Utah Territory, on appeal from your decision of April 9, 1877, adverse to the claims of McKean and the railroad company.

The township plat was filed in the local office on January 9, 1874.

John Spriggs filed Coal D. S. No. 28, May 20, 1874, for the SE. ¼ Section 8, Township 2 North, Range 5 East.

Samuel H. Levan filed Coal D. S. No. 86, on May 20, 1875, for the SE. ¼ Section 8, 2 North, 5 East; and on the thirteenth of May, 1876, assigned and conveyed the SE. ¼ of SE. ¼ of said tract to James B. McKean for the sum of four hundred dollars, and relinquished the balance to the United States.

On May 20, 1875, James H. Nounnan, as agent for David E. Buell, filed Coal D. S. No. 87, for the E. ½ of SE. ¼ Section 8, NE. ¼ of NE. ¼ Section 17, and SW. ¼ of SW. ¼ Section 9, Township 2 North, Range 5 East.

A hearing to determine the rights of the parties was held before the local officers in July, 1876. The claim of the railroad company was rejected and the lands in contest awarded to the town site of Coalville, by my predecessor's decision of February 10, 1877, and it is therefore unnecessary to consider the claims of the company in disposing of this case. The town site of Coalville was not represented at the hearing, and has asserted no claim to these coal mines.

The testimony shows that the lands in dispute contain a valuable vein of coal from ten to twelve feet in thickness; that the same was discovered by John Spriggs in the year 1863; that Spriggs immediately took possession thereof, and expended several thousand dollars in developing said mines.

Spriggs sold an undivided half interest in said mines to D. E. Buell and J. C. Bateman, in the year 1871, and said parties subsequently went into possession thereof, and have ever since remained in possession, either in person or by agent or tenant. They have expended between forty and fifty thousand dollars in developing said mines.

Neither Levan, who filed D. S. No. 86, nor his assignee, J. B. McKean, have ever been in possession of the SE. ¼ of SE. ¼ of said Section 8. Mr. McKean admits that he has placed no improvements on said land and does not know whether Levan improved the same or not.

You found that the testimony failed to establish the good faith of Levan or his assignee, McKean, and rejected said claim for that reason, and awarded the land to Buell, and Mr. McKean has appealed from your decision.

I concur in your conclusion that the claim of McKean is invalid, but not for the reasons assigned in your decision.

As Levan had never been in possession of the land or made any improvements thereon, he was only entitled to make an entry under section 2347 of the Revised Statutes, which is as follows:

"SECTION 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road."

Private entry of coal land.

This section provides for the sale of coal lands by ordinary private entry, and the manner of making such entry is clearly pointed out in paragraphs 26, 27, and 28, of your circular of April 15, 1873, viz.:

"26. Manner of obtaining title—First, by private entry. The party will present the following application to the register, and will make oath to the same:

"I, ——, hereby apply under the provisions of the act approved March 3, 1873, entitled, 'An act to provide for the sale of the lands of the United States containing coal,' to purchase the —— quarter of section ——, in township ——, of range ——, in the district of lands subject to sale at the land office at ——, and containing —— acres, and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have declared my intention to become a citizen of the United States) and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge, within the limits thereof, any vein or lode of quartz, or other rock in place, bearing gold, silver, or copper, and that there is not, within the limits of said land, to my knowledge, any valuable mineral deposit other than coal, so help me God.

"To this affidavit the register will append the usual jurat.

"27. Thereupon the register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant must then pay the amount of the purchase money.

"28. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, from whence, when the proceedings are found regular, a patent or complete title will be issued, and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the Commissioner at Washington, or by the register at the district land office."

Section 2349 makes provision for the filing of coal declaratory statements by the person or persons having a preference right of entry under section 2348, but no declar-

atory statement is authorized or required to be filed by a claimant under section 2347.

The claimant under section 2347, must make the affidavit and application required by paragraph 26 of your instructions, before he can acquire any standing whatever, and as Levan made no such affidavit or application, it follows that he has never initiated any claim recognized by law. His filing was unauthorized and void at its inception, and should be canceled on the records of your office.

It is claimed that inasmuch as Spriggs, Buell, and Bateman are partners in said mine, their right to file for the land in contest was exhausted by the filing of D. S. No. 28, in the name of John Spriggs, and that D. S. No. 87, filed by David E. Buell, is consequently invalid.

One declaratory statement only allowed.

Section 2350 prohibits more than one entry of coal lands, either by individuals or an association of persons, and requires preferred claimants to file their declaratory statements, and prove their respective rights, and pay for their lands, within the period prescribed by section 2349. This section was construed by your predecessor, Mr. Commissioner Drummond, to prohibit second filings, and regulations to that effect were issued by him on April 15, 1873, and are still in force. Inasmuch as interested parties could retain possession of valuable mines for an indefinite length of time, without paying for the lands, by renewing their filings as fast as they expired, I am of opinion that this regulation was necessary in order to protect the interests of the government, and that it should be adhered to. As Buell, Bateman, and Spriggs have made valuable improvements on the land and shown good faith, and as there is no adverse claim, and the matter is between them and the government only, they will be allowed to amend D. S. No. 28 so as to embrace the land mentioned in D. S. No. 87, and the names of all the claimants thereto, and thereafter prove up and pay for the lands.

A mineral.

Your ruling that coal lands are mineral lands is affirmed, and in issuing a patent for the lands in question you will

be governed by the decision of my predecessor of June 7, 1876, in the case of the town-site of Central City, Colorado.

Your decision is modified accordingly, and the papers transmitted with your letter of October 17, 1877, are herewith returned. Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 3. 1. Form for declaratory statement to be filed by an incorporated company, prescribed.

2. Secretary of company to file his own affidavit stating the qualification of each stockholder.

3. Entry not required to be for land in compact form.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 14, 1873.

Register and Receiver, Cheyenne, Wyoming.

GENTLEMEN: You transmitted with your letter of the twentieth June last, the declaratory statement of the Wyoming Coal and Mining Company, and requested instructions as to whether or not the same was made in due form.

When an incorporated company desires to apply for a patent for coal land under the act of Congress approved March 3, 1873, the form of the declaratory statement should be in terms as follows, viz.:

Form of declaratory statement when filed by an incorporated company.

The Wyoming Coal and Mining Company, a corporation consisting of four or more persons, organized under the general incorporation laws of the State of Nebraska—a copy of the certificate of incorporation being hereto attached—and having its principal office and place of business in Omaha, Nebraska, by its Secretary and Treasurer, Thomas Waddle, declares that to the best of his knowledge and belief, each and every stockholder in said company is a citizen of the United States or has declared his intention to become such, that no stockholder of said company, either as an individual or a member of any other association, incorporated or otherwise, has held or purchased any coal lands under the act approved March 3, 1873, entitled "An act to provide for the sale of land of the United States containing coal,"

and that it is the intention of said company to purchase under the provisions of said act the —— quarter of section —— etc. (The remainder of the declaratory statement as filed is satisfactory.)

Secretary of company to file an affidavit.

In case an incorporated company should file a declaratory statement under said act, it will be necessary for the secretary of the company to file his affidavit, setting forth in full the names of all the stockholders at the date of actual purchase. It will also be necessary for each stockholder to file an affidavit to the effect that he has never held or purchased any coal lands under the act approved March 3, 1873, entitled "An act to provide for the sale of the land of the United States containing coal," either as an individual or as a member of an association.

Not in compact form.

While the act of March 3, 1873, limits each individual to one entry, and prohibits the holding of any other coal lands by one who has in any manner participated in the one entry allowed, it is not provided that the tract or tracts entered shall be in compact form, the only restriction being that of quantity, bounded by legal lines of subdivisions.

In according with your request I return the declaratory statement of the Wyoming Coal and Mining Company with amendments made.

Very respectfully, your obedient servant,
WILLIS DRUMMOND, *Commissioner.*

No. 4. Coal lands, claimed as such prior to the date of the definite location of the line of the Union Pacific Railroad past the same, do not belong to the road under the grant.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 26, 1875.

Register and Receiver, Salt Lake City, Utah.

GENTLEMEN: On the ninth of January, 1874, the township plat of township 2 north, range 5 east, was filed in your office.

On the sixth of March, 1874, George Crismon filed declaratory statement No. 15, claiming the south half of

north-east quarter, and lots 1 and 2 of section 3, township 2 north, range 5 east, as coal land.

This land is within the limits of the withdrawal for the Union Pacific Railroad.

On the twenty-first of November you caused a hearing to be held.

The evidence submitted at the hearing shows that Henry B. Wild discovered coal upon this tract in June, 1864, and that Wild and R. J. Redden went into possession thereof, developing said coal bed, and extracting coal therefrom; that they remained continuously in the possession of said lands until the year 1869, when Redden conveyed his interest therein to Charles Crismon and sons, and 1870, when H. B. Wild conveyed to Charles Crismon, Sr., and George Crismon his interest therein.

It also appears that Charles Crismon, Sr., and Nicholas Groesbeck conveyed their interest in said tract to George Crismon, November 21, 1874.

The evidence shows that said land has been in the actual possession and occupation of Wild, Redden, and their grantees since the date of the original discovery of coal therein, and that they have, during that time, expended more than twenty thousand dollars in developing said tract, and in extracting coal therefrom.

The Union Pacific Railroad was definitely located past this land in June, 1868.

The question is presented whether said tracts inure to said railroad company by virtue of their grant.

Mineral lands are excluded from the grant to said company, but the fourth section of the act of July 2, 1864, provides that the term "mineral land" "shall not be construed to include coal and iron lands." Said section also provides that "any lands granted by this act or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp land, or *other lawful claim.*"

The act of third of March, 1865 (13 Stat., 529), provides "that in the case of any citizen of the United States who, at the passage of this act, may be in the business of *bona fide* actual coal mining on the public lands * * * for purposes of commerce, such citizen, upon making proof satisfactory to the register and receiver to that effect, shall have the right to enter according to legal subdivisions a

quantity of land not exceeding one hundred and sixty acres, to embrace his improvements and mining premises."

This act also specifies when the declaratory statement shall be filed, to wit, in case of lands unsurveyed at the date of act, such declaratory statement shall be filed within three months from the return to the district office of the official township plat.

In the case under consideration rights had attached to said coal land under the act of third of March, 1865, before the line of the road was definitely fixed past the land, and hence by the terms of the act of July 2, 1864, said tracts were excluded from the grant to said company.

The right which Wild and Redden had acquired was subject to assignment, and, as hereinbefore stated, was assigned to Crismon.

You will inform all parties in interest of this decision, and should no appeal be taken within sixty days from the date of such notification, you will allow Crismon to complete proceedings in his case.*

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 5. When sections 16 and 36 are found to contain valuable deposits of coal, they are mineral in character, and do not pass to the State under the school grant.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., May 7, 1875.

SIR: I have examined the case of James P. Hogden and Cyrus T. Wheeler v. the State of California, being an application to enter, as coal lands, the south half of section 16, T. 33 N., R. 1 W., M. D. M., Shasta, California, on appeal from your decision of November 3, 1874.

The State claims the land under the act of March 3, 1853.

Coal is a mineral.

You held that mineral land did not pass to the State under said act, and that coal lands were mineral lands.

I affirm your decision, and herewith return the papers transmitted with your letter of March 22 last.

Very respectfully,

C. DELANO, *Secretary.*

To the Commissioner of the General Land Office.

* Affirmed by the Secretary of the Interior, April 11, 1876.

No. 6. Mineral (coal) lands should be withheld from public offering and sale, other than as mineral.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, August 2, 1879.

SIR: I have received your letter of June 10, 1879, inclosing the reports and exhibits of special agent Winters, who was detailed, in pursuance of instructions contained in my letter of September 11, 1878, to investigate the coal and iron lands of the State of Alabama.

From these reports and exhibits, it appears that there is a large quantity of coal and iron lands in said State, some of which, in the opinion of Mr. Winters, are very valuable, and some of them of little or no value. The statute, however, fixes the value of coal, as well as other mineral lands, and, without further legislation, I do not think that we are authorized to dispose of any of said lands at prices other than those established by law. Some of the lands are now considered valuable because of the means of transportation and other advantages. Others are not now considered valuable for the want of means of transportation, and because, also, of the expense of operating the mines. These difficulties, in relation to the latter class of lands, may be overcome in the future, but, whether this be so or not, it can not change your duty nor mine.

Withheld from public sale.

So far as the lands are mineral they should be withheld from sale and disposal—no matter what their value at present may appear to be—until further legislation is had upon the subject. The lands not mineral in said district should be offered for sale and disposal in accordance with existing law.

I herewith return the papers transmitted, in order that you may take such action in the premises as you may deem necessary.

Very respectfully,

C. SCHURZ, *Secretary.*

To the Commissioner of the General Land Office.

CHAPTER XI.

STATE LAND GRANTS.

No. 1. *a.* Power of Congress to alter or repeal grant before title rests.
b. Grant of sections 16 and 36 a present grant, but title does not vest until survey.
c. "Settlement" referred to in the seventh section, Act of March 3, 1853, not restricted to a claim under the pre-emption law.
d. Sections 16 and 36, when mineral in character, do not pass to the State of California under the grant.
No. 2. *a.* If sections 16 and 36 are not known to be mineral in character at date of survey, the grant takes effect.
b. No. 1 still authority.
No. 3. Colorado grant of sections 16 and 36.
No. 4. Sections 16 and 36, containing valuable deposits of coal, do not pass to the State of Colorado under the school-land grant.
No. 5. Salt springs.
No. 6. Lieu lands.
No. 7. University of Callfornia. Selection of mineral lands.

No. 1. 1. Congress has power to alter, modify, or repeal a grant at any time before title vests.*

2. The grant of sections 16 and 36 was a present grant, but did not vest title in the State until survey.

3. The "settlement" referred to in the seventh section of the Act of March 3, 1853, is not the restricted pre-emption settlement.

4. When sections 16 and 36 were found to be mineral in character, they did not pass to the State of California under the grant.†

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., April 28, 1873.

SIR: I have examined the case of the Keystone Consolidated Mining Company, Original Amador Mining Company, Bunker Hill Quartz Mining Company, Eureka Quartz Mining Company, and Townsite of Amador City v. The State of California, on appeal to the Department from the decision of the Commissioner of the General Land Office of June 18, 1872.

The land in question is the east half of section 36, township 7 north, range 10 east, Mount Diablo meridian, in the State of California. The State claims the entire tract under the act of Congress of March 3, 1853 (10 Stat. 244, sec. 6), as school land. The mining companies claim a portion

*See Frisbie v. Whitney, 9 Wall. 196; Hutchins v. Low, 15 Id. 77.
†See Higgins v. Houghton, 25 Cal. 252.

of it under the act of July 26, 1866 (14 Stat. 251), and Amador City claims a part of it under the act of March 2, 1867 (14 Stat. 541). The land is mineral land, and said mining companies located their mines for most of the territory now claimed by them in 1851, and for the remainder in 1856, 1863, and 1864. They have continuously worked these mines from time of location to the present, and have expended on the same a large sum, exceeding one million dollars, and have realized from them a still larger sum. They have complied with all the provisions of the act of July 26, 1866, and have made their respective applications in due time.

Amador City was located on the half section in controversy, in the immediate vicinity of said mines, in 1851, and then had a population of about seventy-five persons. It contained about three hundred inhabitants at the date of the act of March 3, 1853, and now contains about five hundred. It has about one hundred dwelling-houses, two stores, two saloons, one hotel, one post-office, one express office, one telegraph office, one church, and one school-house. It has filed an abandonment of all claim to any portion of the legal subdivisions upon which it is situated, so far as the same conflicts with the claim of either of the mining companies.

The survey of the township lines of said township 7 was completed August 27, 1869. The section lines were run March 10, 1870. The plat was approved September 30, 1870, and filed in the local office October 7, 1870. The State of California, on the fourth of November, 1870, sold to Henry Casey the east half of said section 36, for the sum of four hundred dollars, and the claim to the same is now prosecuted by him or those that claim under him.

Upon these facts, it is conceded by all parties to this contest, that each of the said mining companies is entitled to a patent for the lands claimed by it, unless the title for said half section is now vested in the State of California or its grantee. It is also conceded that the claim of Amador City is good and valid, unless in conflict with the title of the State or its grantee.

The local officers rejected the title of the State, and their decision was affirmed by the Commissioner.

The claimant under the State has appealed, and the whole case is now before this department on its merits. It involves a construction of the act of March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes."

In attempting to ascertain the true meaning of this act, I shall assume, as hornbook law, that in every valid grant there must be a grantor capable of making the grant, a grantee capable of taking it, and a thing granted capable of identification with reasonable certainty; that all grants made by the General Government to individuals, corporations, or States, are to be construed strictly against the grantee, and that nothing passes by implication; that the intent of the law-makers is to govern, and that such intent is to be gathered from the entire act.

In the further examination of this case, I propose to consider the following inquiries:

First. When does title vest in the State to sections 16 and 36 under said act?

Second. Does the seventh section except from the grant, land upon which settlement has been made prior to survey for other purposes than pre-emption appropriation?

Third. Does the grant include mineral lands in sections 16 and 36?

First. When does title vest in the State to sections 16 and 36, under said act? Section 6 of the act reads as follows: "That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of land appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one," etc.

It is claimed by appellant that this section contains a grant *in præsenti* to the State, taking effect from the date of the act, upon all tracts afterward located by government survey on sections 16 and 36 in each township, and that

complete title was vested in the State to the same on the third of March, 1853, and that Congress thereafter had no power to provide a way for a different disposition of any such lands. On the other hand it is claimed, on behalf of the mining and town site companies, that the grant, though in words *de præsenti*, was in fact a grant in the nature of a float, taking effect to vest title upon no specific tracts until survey, and that, until such survey, Congress had power to make other and different disposition of the land.

Power of Congress to alter, etc., grant.

The power of Congress to change, modify, alter, or repeal the grant in question at any time prior to the date when title vests in the State, will not, I think, be questioned, and it is equally clear that after title has once vested, Congress has no further power to alter, modify, or change the grant. It is evident, therefore, that, with reference to this branch of the case, it is only necessary to inquire whether title to sections 16 and 36 vested in the State prior to the act of July 26, 1866. If it did, then Congress had no power to dispose of the land in the manner pointed out in that act; if it did not, then the title of the mineral claimants is good and patents must issue to them for the tracts claimed.

In my opinion, the sixth section of the act of 1853 should be construed as a grant to the State *in præsenti*, in the nature of a float, taking effect upon specific tracts when the same are surveyed by the United States, and not before. The grant is in words, *de præsenti*, but until survey there are no tracts or parcels of land in existence answering to the calls of the grant. A beneficial interest under it can only ensue to the State when the United States, in extending the lines of the public surveys, sets apart certain tracts and designates them as sections 16 and 36. It will not be denied that Congress had the legal power, no matter what may be said of the political obligation of the government, to provide that this land should never be surveyed, or that in surveying it a different method should be adopted than that now in use, and no such tracts as sections 16 and 36 be set apart. Would not the passage of such an act have operated to entirely defeat the grant to the State? The grant calls for certain tracts by recognized technical desig-

nations. No such tracts could be found, and the State would be without remedy to compel the government to create them. A like effect would be produced by a refusal of the executive officers of the government to extend the surveys. The State would be indefinitely without beneficial interest in the grant. Of course the happening of the contingency I have mentioned could hardly for a moment be apprehended, for the United States is, in good faith to the State, and in the performance of its political obligations, bound within reasonable time, in the extension of the public surveys, to set apart the tracts granted; but I refer to it to show the nature of grant in the State and its liability to defeat before survey.

I think the grant is in nature the same as that usually made by Congress to railroad companies to aid in the construction of their roads. These grants are generally for a certain number of sections, designated by odd numbers on each side of the road, with a provision for indemnity selection, in case any of such sections shall have been sold or otherwise disposed of prior to the definite location of the line. The highest judicial authority (Railroad v. Smith, 9 Wall. 99; Railroad v. Fremont Co., 9 Id. 90), has repeatedly held that these grants did not vest any right in the companies to specific sections until the line of the road was definitely fixed on the face of the earth. The grant to California by the act of 1853 is similar. It is for certain sections designated by numbers, the precise location of which can not be definitely ascertained until survey. The grant in both becomes certain upon the happening of a contingency; in the former by definite location, in the latter by survey. In the railroad cases, the Supreme Court holds that title to specific tracts vests only on the happening of this contingency that makes the grant certain as to location. Why should not the same rule be applied to the grant to the State, and the title held to be vested upon the happening of the contingency that makes that grant certain as to location?

In the case of Gaines et al. v. Nicholson, 9 How. 365, passing upon the right of the State of Mississippi to school sections under an act (2 Stat. 229), reserving section sixteen in each township for the support of schools, and two

subsequent acts providing for indemnity to the State for loss of same by reason of interference with foreign grants and for leasing such lands for the support of schools, the Supreme Court said: "The State of Mississippi acquired a right to every sixteenth section by virtue of these acts on the extinguishment of the Indian right of occupancy, the title to which in respect to the particular sections became vested, if vested at all, as soon as the surveys were made and the sections designated."

The case of Cooper v. Roberts, 18 How. 173, although cited and relied upon by counsel for the State, seems not to sustain their position, but rather follows and affirms the principles enunciated in Gaines v. Nicholson.

The United States, in her compact with the Territory of Michigan, on her admission to the Union as a State, ratified July 25, 1836, appropriated to the State section sixteen in each township for the benefit of schools. The land in controversy was surveyed in the summer of 1847, and designated as section sixteen. The right of the State to the same was contested by certain mining claimants asserting rights under a purchase of the government of lead mines, under the act of March 1, 1847, to whom a patent had issued, reserving the right of the State. The court first examined the history of the usual grants to the States, upon their admission to the Union, for the benefit of schools, showing that these gifts were the result of a cherished policy on the part of the government for the encouragement of popular education, and declaring that the compact with the States did not except mineral lands from the operation of the grant. The court then said: "We agree that until the survey of the township and the designation of the specific sections, the right of the State rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title." The court then passed to the consideration of the question whether any such "legal impediment" was created by the act of 1847, and decided

that there was not, for the reason that said act expressly excepted section sixteen from its operation. The court then further inquired whether the execution of a lease to the mineral claimants by the Secretary of War, with the right of renewal upon the lessee's compliance with certain conditions, upon which lease the claimants, having continued in possession, and complied with conditions, were allowed to make entry under the act of 1847, was a legal impediment preventing the title from vesting in the State, and held that it was not such an impediment, for the reason that the claim of the company was not perfect under the lease, the act of 1847, and the act of September, 1850 (9 Stat. 472). The court said: "Hence had there been a legal impediment to the execution of the compact with Michigan, enacted either by the second section of the act of 1847, which separated, for some purposes, the mineral from the public lands, or by the privileges granted to the lessees or their assigns, in the third section of that act, it was removed by the repealing clause of the act of 1850, and the non-compliance with the conditions on which the privileges depended."

It is thus seen that even in the case of a compact between the United States and the State of Michigan, duly ratified by the State (a much stronger case than that of the simple grant, by an ordinary act, to the State of California), the Supreme Court recognized the power of Congress, by subsequent legislation, to interpose a legal impediment to the title to school sections vesting in the State upon survey. There was no intimation that this power of Congress was doubted by the court. It was plainly recognized in every inquiry, and the title of the State was affirmed on the sole ground that no such impediment existed.

In the case of Kissell v. Saint Louis Public Schools (18 How. 19), in discussing the right of the school commissioners of Saint Louis to certain out-lots, town lots, etc., reserved for the use of schools by the act of June 13, 1812 (2 Stat. 148), and the confirmatory act of January 27, 1831 (4 Stat. 435), which said lots were to be surveyed under the provisions of the first mentioned act, the court said: "Our opinion is that the school lands were in the condition of Spanish claims after confirmation by the United States, without having established and constructed boundaries

made by public authority, and which claims depended for their specific identity on surveys to be executed by the government. The case of West v. Cochran, 17 How. 413, lays down the dividing line between the executive and judicial powers in such cases, to wit: that until a designation, accompanied by a survey or description, was made by the surveyor-general, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries."

In the case of Van Valkenberg v. McCloud, 21 Cal. S. R., 330, the Supreme Court of California, in construing the five hundred thousand acre grant to the State, under the act of Congress of September 4, 1841 (5 Stat. 453), held that selections could be made thereunder prior to the survey of the land, subject to subsequent change to conform to the government lines, but this decision was overruled in the subsequent cases of Terry v. Megerle, 24 Cal. 624; Grayson v. Knight, 27 Cal. 507; and Middleton v. Lowe, 30 Cal. 596. In the latter case, referring to the decision of Grayson v. Knight, the question being one relating to the right of the State to sections 16 and 36, under the act of 1853, the court said: "The reasons operating to prevent the State or her vendee from acquiring a title by the aid of selection made, as in that case before the congressional survey, are equally cogent to show that title to any particular parcel of the lands granted for the purposes of public schools, does not vest in the State until such survey has been made. * * * It thus appears that the grant to the State has not attached to the land in controversy (section 36), both because of the exception in the act of Congress in favor of private grants, and because the lands have not been surveyed by the United States."

The case of Higgins v. Houghton, relied upon by counsel to sustain the claim of the State, seems rather, upon a careful examination, to sustain an opposite view of the law from that contended for. The case involved a question as to the right of the State under the act of 1853 to sections 16 and 36, and the court said: "We consider that in the grant to California of March 3, 1853, the power of locating the quantity granted, 1,280 acres, in effect in two parcels in every township, was reserved by the government, and as fast as townships thereafter were surveyed and sectionized,

that the State became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quantity, but as to position also. Township No. 13 was surveyed and properly subdivided subsequent to the grant and prior to May 20, 1861; and since the date of that occurrence, the State, by the effect of the grant, and by the law of the event, has been and is now the absolute and several owner of the sixteenth and thirty-sixth sections of that township as against the government. If there is any legislation by Congress prior to the grant which would interfere with the conclusion, as the objection in effect supposes, it has not been brought to our notice, and if there has been any legislation since the grant that conflicts with the conclusion, it must be null and void, unless, indeed, it has been acceded to by the grantees." The court here distinctly holds that, when township No. 13 was surveyed and properly subdivided, the State, by the effect of the grant and the law of the event, acquired an absolute and several ownership to the sixteenth and thirty-sixth sections. This is what I hold to be the true interpretation of the act, and I have no doubt that, after such survey, the title of the State in agricultural lands was vested and beyond the reach of Congress. I do not understand the reference by the court to possible legislation of Congress to mean anything more than that any subsequent legislation attempting to interfere with this vested right would be null and void.

I find strong support for the view I have expressed in other portions of the act of March 3, 1853, and in contemporaneous legislation. The seventh section provided that where the sixteenth and thirty-sixth sections should be reserved for public uses before the same should be surveyed, other land should be selected by the proper authorities of the State in lieu thereof. At the passage of the act no reservations of lands for public uses in California, or comparatively none, had been made. The public lands were unsurveyed, and reservations would be needed for light-houses, forts, arsenals, fortifications, and Indian reservations. There were then over 60,000 Indians in the State, and provision would necessarily be required for them. In fact, Congress did provide for five Indian reservations in California, of 25,000 acres each, on the very day this act

was passed (10 Stats. 238). Is it for a moment to be supposed that Congress would, by the sixth section, give to the State an absolute vested right in all lands that should fall upon sections sixteen and thirty-six, and in the very next section provide that it should have no right whatever in any of said sections which might thereafter be reserved, before survey, for public uses, but should be compelled to take other lands in lieu thereof? I can not believe that it so intended.

In opposition to the reasons and authorities above set forth, counsel for the State have cited several cases, which they claim sustain a different construction of the act, and which I will now consider. The first of these is Rutherford v. Greene, 2 Wheat. 196. In 1782, the State of North Carolina passed an act by which the State reserved a tract of land for the relief of officers and soldiers in the continental line, and appointed a board of commissioners to set off the land allotted to each. The tenth section provided "that 25,000 acres of land shall be allotted for, and given to Major-general Nathaniel Greene." The commissioners allotted 25,000 acres to General Greene, and caused the tract to be surveyed, which was done on the eleventh of March, 1783. It was claimed that the words "shall be allotted" did not import a grant, and that the legislature, after the allotment and survey, had made a different disposition of the land in controversy, but the court held that the title of Greene was valid. Chief Justice Marshall, in delivering the opinion of the court, said: "As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land shall be allotted for and given to Major-general Nathaniel Greene.' Given when? The answer is unavoidable. When they shall be allotted. Given how? Not by any future act, for it is not the practice of legislation to enact that a law shall be passed by some future legislature, but given by force of this act." "Nothing can be more apparent than the intention of the legislature to order these commissioners to make the allotment, and to give the land, *when allotted*, to General Greene." * * * "The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina, had now

become a particular gift of the 25,000 acres contained in the survey." * * * "It is clearly and unanimously the opinion of this court, that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey, made in pursuance of that act, and returned in March, 1783, *gave precision to that title and attached it to the land surveyed.* That his rights are not impaired by the act of 1783 and the entry of appellant, all of which are subsequent to his survey."

It would be difficult for the learned counsel to find a case more in conflict with the doctrine which it is cited to support.

In Lessieur v. Price, 12 How. 59, the Supreme Court construed the act of Congress of March 6, 1820, 5 Stats. 545) which enacted "that four entire sections of land be, and the same are hereby granted to the said State (Missouri) for the purpose of fixing the seat of government thereon; which said sections shall, under the direction of the Legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the Legislature aforesaid may select, on any of the public lands of the United States."

Four sections were selected which were claimed under a New Madrid location, and it became material for the court to fix the time at which title vested in the State to the lands selected. The court said: "The land was granted by the act of 1820; it was a present grant, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in Rutherford v. Greene's Heirs, 2 Wheat. 196, that the act of 1820 vested a title in the State of Missouri of four sections; and that the selections made by the State Legislature, pursuant to the act of Congress, and the notice given of such location to the Surveyor-general, and the Register of the local district where the land lay, gave precision to the title and attached to it the land selected." And again: "The next inquiry is as to the date when the land selected attached to the grant. June 28, 1821, the Governor of Missouri notified the Surveyor-general of the fact that the land had been

located by the Commissioners, and awaited the action of the Legislature, and on the thirty-first day of December, 1821, the land was accepted by the Legislature. The same act provides for laying off a town and the establishment of the seat of government thereon. And as the commissioners had power to locate, and did so, subject only to legislative sanction of their report, and that report was sanctioned, our opinion is that the acts were concurrent, and that the *title* refers to the first act, and therefore that the State took title from the twenty-eighth of June, 1821, when the Surveyor-general was notified that the location had been made."

Thus it appears that although the court held that the grant was a present one, it also held that title to the particular sections did not vest on the sixth of March, 1820, the date of the act, but did vest on the twenty-eighth of June, 1821, the date when the Surveyor-general was notified of the selection.

Grant did not attach until survey.

By parity of reason it should be held in the case now under consideration that although the grant to the State by the act of 1853 was a present grant, yet it did not vest title to sections 16 and 36 until a survey had been made which "gave precision to the title, and attached to it the land surveyed."

In How v. The State of Missouri, 18 How. 126, the court held that the grant to the State of section 16 in contest, by act of March 6, 1820 (2 Stats. 547), adopted by ordinance declaring the assent of the State thereto, July 19, 1820, was not affected by the subsequent confirmation by Congress of a Spanish claim theretofore rejected by the board. It appears, however, that the particular section in contest in that case was surveyed prior to the passage of the act confirming the Spanish claim, and that three of the justices dissented from the opinion of the court, if intended to go further than to hold that although the tenth section of the act of March 3, 1811, prevented title from vesting in the State until final decision by Congress on the claim of Vallé (Spanish claimant), yet the act of May 24, 1828, confirming lands to Vallé, operated as such final decision, and

excepted from confirmation so much land as was included in section 16 then surveyed.

In the case of Veeder v. Guffey, 3 Wis. 520, it was held that the act of Congress approved August 8, 1846, took effect upon the admission of the Territory of Wisconsin to the Union as a State; that it vested in the State the title, potentially, to a quantity of land equal to three sections in width on each side of the Fox river, and determined the location of the lands to be the alternate sections on each side of the river, requiring only the ministerial acts of survey, selection, and approval to render the specific parcels which would fall to the State or the United States definite and fixed, and that, by the grant, the State, upon admission to the Union, became seised of one half of the lands on each side of the Fox river; and, the mode of partition being established by the grant, it was competent for the State to provide modes and terms of sale. It will be noticed that in the act of 1846 are descriptive words very dissimilar from those used in the act of 1853, being as follows: "A quantity of land equal to one half of three sections in width on each side of said Fox river;" and also that by the second section of the act it is distinctly provided "that, as soon as the Territory of Wisconsin shall be admitted as a State into the Union, all the lands granted by this act shall be and become the property of the State." This express provision of the second section, and the peculiar character of the descriptive words, seem to have governed the court in its decision as to the time when the title vested in the State.

Secretary Stuart, September 10, 1851 (1 Lester, 495), in passing upon the grant to Michigan of school sections, already referred to, in citing the case of Cooper v. Roberts, 18 How. 173, said: "I regard it as an absolute grant of every sixteenth section which had not on the twenty-third June, 1836, been sold or otherwise disposed of, whether then designated by survey or not." This decision was followed by Acting Secretary Otto, July 10, 1867, in a case involving the construction of the act of 1853, under which the State of California claims. In this case the Acting Secretary said: "The sixth section of the act entitled 'An act to provide for the survey of the public lands in Califor-

nia,' etc., approved March 3, 1853, granted to the State of California of the public lands, whether surveyed or unsurveyed, sections 16 and 36 for the purposes of public schools in each township."

From this quotation it would appear that the Acting Secretary construed the sixth section as though it read "with the exception of sections 16 and 36, which, whether surveyed or unsurveyed, shall be, and hereby are, granted to the State for the purposes of public schools," etc. I think it should be construed as though it read as follows:

Construction.

"*And be it further enacted,* That all the public lands in the State of California, whether surveyed or unsurveyed, shall be subject to the pre-emption laws of the fourth of September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as herein otherwise provided, and with the exception of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands."

I have been shown a newspaper report of a late decision of the Supreme Court of California, in the case of Sherman v. Buick,* in which that court held that the act of March 3, 1853, vested an absolute title in the State to sections 16 and 36 from the date of the passage of the act, and that Congress thereafter had no power to dispose of said sections before survey. The opinion of the court is very brief. It cites and relies upon the former rulings of the court in the cases therein mentioned, which cases, as I understand them, do not go to the full extent claimed for them.

This decision is not satisfactory to my mind, and I apprehend is not entirely satisfactory to the learned court which pronounced it, as I am informed that a rehearing has already been allowed.

I am satisfied, upon full consideration of all the cases cited, and the exhaustive arguments of the able counsel

* U. S. Supreme Court, 3 Otto, 209.

representing all parties in interest, that the weight of authority is clearly in favor of the construction I have given above.

Second. Does the seventh section except from the grant land upon which settlement had been made prior to survey for other purposes than pre-emption appropriation?

The seventh section of the act of 1853 is in part as follows:

"*And be it further enacted,* That when any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or when such sections may be reversed for public use or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof."

It is claimed on behalf of the mineral claimants that this section excepts from the operation of the grant all lands in sections 16 and 36 upon which a settlement of any kind had been made, prior to survey, by the erection of a building or buildings, or the cultivation of any portion of the land, whether such settlement was made with a view to pre-emption, or for entry as town sites, or otherwise. On the part of the State it is claimed that the exception includes only settlements made with a view to pre-emption, and that none other would protect sections 16 and 36 from the grant.

The language of the seventh section is not so clear as to be entirely free from doubt, but a careful examination of the terms used, and a consideration of the various objects evidently intended to be accomplished by Congress in its passage, will show, I think, that the exception includes more than simply settlements with a view to pre-emption.

I call attention to the language used: "That where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections," etc. A person may erect a dwelling-house on, or he may cultivate a portion of a tract of land without acquiring a pre-emption claim. Both the erection of a house and cultivation are requisite on the part of a pre-emption.

Character of settlement.

If Congress had intended to limit the settlement of what is technically known as a pre-emption settlement, I think it

would have used more apt words to express such intent. It would have said "that where any pre-emption settlement shall be made," etc. It has done no such thing, but, on the contrary, has adopted such a mode of expression as, to my mind, negatives the idea that a pre-emption settlement alone was intended.

To limit the exception to settlements made by pre-emption claimants, would be to protect comparatively few of the actual settlements in any of the mining districts, and to award to the State many very valuable and lasting improvements made under authority and sanction of law and the usages of the country. It is a notorious fact that few, if any, settlements in the early days of California were made in any portion of the State for the purposes of agriculture. Emigration was drawn to the State, and settlements made almost entirely with a view to developing and working the newly-discovered mines. The miners located in villages and small settlements, cultivating the land only so far as was necessary in following their occupation of mining. Under the construction of the act contended for by the State, none of the settlements or improvements so made were protected from the grant, except, perhaps, town sites upon purely agricultural lands. Is it reasonable to suppose that Congress intended to protect isolated pre-emption claimants, and at the same time to grant to the State the valuable improvements of miners, and in some instances include whole villages in the vicinity of the mines? The eighth section of the act expressly provided that the public lands (not mineral) occupied as towns or villages should not be subdivided or subject to sale or appropriation by settlement under the provisions of the act, but should be subject to the town-site act of May 23, 1844, except town sites on or near mineral lands, the inhabitants of which should have the right of occupancy or cultivation only until such time as Congress should dispose of the same. I do not suppose that it will be doubted that this section excepted from the grant of the State any such town sites found by survey upon agricultural land in sections 16 and 36; but if the construction of sections 6 and 7 contended for by the State be allowed, it is clear that a town located on or near mineral lands would pass to the State under the

grant. Can it be for a moment supposed that Congress intended to hold out inducements to miners to settle on or near mineral lands in towns and villages, and by the very same act give their improvements away to the State, while protecting some, and these the solitary agricultural settlers?

One of the great objects of the act seems to be in providing for the disposition of the public lands, according to the various elements claiming recognition, and to protect each interest created from encroachment by the others. The seventh section was intended to protect all settlements made upon the public land before survey from the grant to the State, which, from its peculiar nature as to final position, threatened every settler whose claim or improvements were not bounded by subdivisional lines of public surveys. This intention of Congress would be defeated by the construction contended for by the State.

I am of opinion, therefore, that the seventh section of the act excepts from the grant to the State lands upon sections 16 and 36, upon which any settlement, by the erection of a building or buildings, or the cultivation of any portion of the land, has been made prior to survey.*

Third. Does the grant include mineral lands in sections 16 and 36?

Mineral lands not granted.

In my opinion, Congress, by the act of 1853, did not intend to grant, and did not grant, to the State any mineral lands that, by survey, are shown to be in sections 16 and 36. The act was passed soon after the discovery of the great mineral wealth of California had been made. The attention of the country and of Congress was called to the question of the disposition of such lands. No plan had been adopted. Congress for the first time undertook to legislate in regard to the public lands in that State.

* The act of March, 1856, "for the protection of actual settlers and to quiet land titles in this State," was passed for the benefit of those who are desirous of building up homes in the country, and for that purpose are seeking, in good faith, lands for settlement and occupation; and hence, the eleventh section of the act does not apply to miners engaged simply in extracting gold from the quartz vein. They are not "settled upon" their vein in the sense of the statute, and the two years' limitation of that section can not avail them. Fremont v. Seals, 18 Cal. 433.

A careful examination of the act will show that Congress did not intend to dispose of any of its mineral lands, but contemplated a future disposition of them. The eighth section provides that the inhabitants of towns located on or near mineral lands, shall have the right of occupation and cultivation "only until such time as Congress shall dispose of the same." It evidently did not then suppose that it was disposing of a considerable portion of them. The act, in a great many of its provisions, very carefully reserves the mineral lands from its operation. Thus, in the sixth section, it is provided that the mineral lands shall be excepted from the lands subject to the pre-emption laws; in the seventh section it is provided that no person shall obtain the benefits of this act "by a settlement or location on mineral lands," and in the eighth section it is provided that the inhabitants of towns located on or near mineral lands, shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same. And, in the twelfth section, it is provided that the State shall have the right to select two townships, or seventy-two sections, for the use of a seminary of learning: "*Provided, however,* That no mineral lands shall be subject to such selection;" and in the thirteenth section the State is given the right to select ten sections for the purpose of erecting the public buildings of the State: "*Provided, however,* That none of said selections shall be made of mineral lands." Why all this care and painstaking to exclude mineral lands from these minor provisions, if it were intended to give the State mineral lands in the major provision relating to the sixteenth and thirty-sixth sections? I think Congress intended to reserve all the mineral lands from the operation of the act, and that there might be no doubt about this reservation as to the sixteenth and thirty-sixth sections, it expressly provided in the third section "*that none other than township lines shall be surveyed when the lands are mineral.*" As I have before attempted to show, the grant could not take effect until survey, and this third section, which must be construed as a part of the act, and in connection with *all* its other provisions, expressly prohibits the only survey that could possibly locate these sections. It therefore, in connection with the other express reservations, satisfies my

mind that Congress did not intend to make a grant of mineral lands to the State, and that those members of Congress who undertook to speak for the committees having the matter in charge, were correct when they stated in debate that no mineral lands were granted by the act. (See Cong. Globe, vol. 25, pp. 1036–1038.)

I regard the act of July 26, 1866, as providing an exclusive method for appropriating the mineral lands of the United States. It was the first act passed by Congress, and perhaps the first ever passed by any government which undertook to dispose of its mineral lands. It provided in its first section, "That the mineral lands of the public domain" (which is equivalent to saying all the mineral lands of the public domain), "both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

It required every person claiming any mine to occupy and improve the same, and expend thereon in labor or improvements not less than one thousand dollars, and to do and perform certain other things. It limited the location of any individual to two hundred feet along the vein, with an additional two hundred feet for discovery, and any association to not more than three thousand feet, and required payment at the rate of five dollars per acre. It provided that when the mineral lands should be surveyed, the Secretary of the Interior might designate and set apart such portions of the same as were clearly agricultural, and that the same should be subject to pre-emption and sale as other public lands. In short, it adopted a system for the disposition of the mineral lands, and such a system as would give every citizen an equal opportunity to engage in the business of developing them. It was evidently intended to be the only method by which mineral lands could be appropriated. It made no exceptions in favor of school or other grants.

If the State should obtain two sections in every mineral

township, it might establish a mineral system for itself, and one in conflict with that of the General Government. In my opinion, Congress never intended to make such a state of things possible.

No surveys of mineral lands were authorized or made until the passage of the act of July 9, 1870 (16 Stat., 217, sec. 16), and long after the passage of the act 1866.

I am constrained to hold that no mineral lands were granted by the act of 1853. If I am in error, the State can lose nothing, for she has an easy method of presenting the question for decision of the Supreme Court, where it will doubtless finally go. If, however, my decision should be in favor of the State, and it should be erroneous, there would be very many cases in which I am unadvised of any way by which the error could be corrected.

I affirm your decision, and herewith return the papers transmitted, with your letter of the twenty-first of October last. Very respectfully,

C. DELANO, *Secretary.*

Hon. W. DRUMMOND, *Com'r General Land Office.*

No. 2. 1. If sections 16 and 36 are not known to be mineral in character at the date of the United States survey thereof, the right of the State attaches thereto under the school grant.

2. The decision of Secretary Delano in the Keystone case still authority.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., April 4, 1877.

SIR: I have considered the State of California v. L. J. Poley and Henry Thomas, involving the right to the north-east of south-east quarter of section 36, township 3 south, range 13 east, M. D. M., Stockton, California, on appeal from your decision of June 26, 1875.

The State claims under the school grant. Poley and Thomas apply for a patent under the mining act. The township was surveyed in December, 1854, and the plat was filed in the local land office March 14, 1855. The placer mining claims appear to have been located in the year 1858.

It will thus be seen that the question presented is, whether the State of California has a legal title to the land in sections 16 and 36, where it is ascertained, after the

survey and identification of said sections, that the land therein is mineral.

By the sixth section of the act of March 3, 1853, the sections above designated were granted to the State of California for school purposes, and when the lands were surveyed, the title of the State attached to the same; and, if there was no legal impediment, became a legal title. (18 How. 173.)

After a very elaborate discussion, my predecessor, Mr. Secretary Delano, held that Congress, by the act of 1853, did not intend to grant, and did not grant to the State any mineral lands which by survey are shown to be in sections 16 and 36: Copp's Mining Decisions, p. 109. Accepting this conclusion as the correct one, the question still remains, did the title to lands in said sections vest in the State, upon survey, if their mineral character was unknown at the time, and the same were regarded by the officers of the government as ordinary public lands, not reserved or otherwise appropriated, but subject to disposal under the general laws of the United States?

It must be held that it did so vest, unless there was an express prohibition existing by virtue of some law.

It would seem that it was the intention of the framers of the act not to grant any of the mineral lands to the State. Mr. Hall said in the House of Representatives, on the day of its passage: "There are some donations made to the State of California, but they are precisely the same as those made to the other States of the Union; but in the clauses making the donations, it is provided that the mineral lands and the lands reserved for other public uses shall be excepted. Mineral lands are reserved in all cases." (Congressional Globe, vol. 26, p. 1038.)

In support of this theory, the twelfth section of the act may be cited. By its provisions, seventy-two sections of land were granted to the State for the use of a seminary of learning, and mineral lands were excepted; but it will be observed that the lands were to be selected by legal subdivisions; and, by an express provision in section 3 of the act, none but township lines were to be surveyed when the lands were mineral; hence the prohibition was well defined and easily followed. The same remarks will apply to the

grant made by section 13 of the act, for the purpose of erecting the public buildings of the State.

By the sixth section of the act under consideration, all the public lands in the State of California were declared subject to the pre-emption laws, except "sections 16 and 36, which shall be, and hereby are, granted to the State for the purpose of public schools in each township." * * * There appear to be no words of limitation or restriction in the clause making the grant. The words are absolute and unqualified; the sections are excepted from the operation of the pre-emption law, together with lands otherwise appropriated or reserved by competent authority, or claimed under a foreign grant, and mineral lands; but I know of no rule of construction of language that would justify an interpretation of the words used in the granting clause that would in effect be a limitation of said grant. This view does not, I think, conflict with that expressed by Secretary Delano; for by section 3, above cited, lands known to be mineral could not legally be surveyed or designated as school lands. In compliance with the doctrine established by the courts, it must, I think, be held that the title vested in the State at the date of the survey, when the land was not known to be mineral, or was not treated as such by the government.

When right of State attaches.

If, following the doctrine of the courts, the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be effected? If for three years, why not for ten or fifty, or after the title derived from the State has been transmitted through numerous grantees? For lands confessedly not mineral at the date of survey, may, many years thereafter, be ascertained, through the improvements in mining operations, to be valuable as mineral lands. To maintain such a doctrine might result in placing in jeopardy the title held by grantees to all the school lands in California, and could only be authorized by the most positive and clearly expressed provisions of law. In my opinion, there is nothing

in the act which can thus be interpreted. I must therefore hold that the discovery of the mineral character of land in sections 16 and 36, subsequent to survey, does not defeat the title of the State to the same as school land. The case of Sherman v. Buick, 45 Cal. 656, is cited by counsel. In this case, the court held that "the title to each sixteenth and thirty-sixth section, upon its being surveyed, vests absolutely in the State." This decision was reversed by the United States Supreme Court at the present term.

After a careful examination of the case, however, I do not think that the question of the title of the State to mineral lands is involved, or that the decision in any way affects that question.

It is not intended to assert that the title to the lands in said sections passes to the State upon the survey under the provisions of the acts of July 26, 1866, and July 9, 1870, said lands at the date of survey being recognized and regarded as mineral.

The views expressed by Secretary Delano, before referred to, will continue to control the department in the disposal of lands thus designated.*

There are other questions presented in the case under consideration; but if the views above expressed are correct, their consideration is not called for.

Your decision is reversed, and the papers transmitted with your letter of September 10, 1875, are herewith returned. Very respectfully,

C. SCHURZ, *Secretary.*

To the Commissioner of the General Land Office.

No. 3. 1. The provision in the act of February 28, 1861, providing for a temporary form of government for the Territory of Colorado, respecting sections 16 and 36 in each township, was a reservation—not a grant; and those sections remained the property of the United States until granted by act of March 3, 1875, providing for the admission of Colorado into the Union.

2. By the proviso in the said act of March 3, 1875, all mineral lands were excepted from its operation; and any of said sections 16 and 36 known to contain minerals prior to the admission of the said State are excepted from the grant.

3. The grant as to such sections surveyed *subsequent* to the admission of the State, took effect upon the approval of the survey by the Surveyor-general.

*See No. 1.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 18, 1879.

Register and Receiver, Pueblo, Colorado.

GENTLEMEN: I have examined the record of proceedings and proof in the case of the Townsite of Silver Cliff v. The State of Colorado, involving the right of the authorities of the town of Silver Cliff to enter, under the laws of the United States, as a town site, certain lands in section 16, township 22 south, range 72 west, your district.

The application to make such entry by the commissioners appointed for that purpose by the board of trustees of the town, was refused by you on the ground that the land involved was a school section, and inured to the State of Colorado under its grant of sections 16 and 36 for school purposes.

The declaration of the claim of the town was filed, and after due notice to the State, a hearing was had, commencing May 8, 1879, to determine the character of the land in said section 16, and whether it was known as mineral land prior to survey. Said section was surveyed from January 20 to 30, 1872, and the survey approved February 10, 1872. The report of the surveyor does not name any indications of minerals.

At said hearing all parties were present. The testimony submitted shows beyond a reasonable doubt, that the land was known as mineral as early as 1864, and that at different times between that date and 1872, various parties prospected the land, took out specimens of minerals, some of which were assayed and found to yield a good return in silver, with traces of gold. The State cross-examined the witnesses, but introduced none.

The legislation of Congress relating to sections 16 and 36 in each township in Colorado, is as follows:

Section 14 of "An act to provide a temporary government for the Territory of Colorado," approved February 28, 1861 (12 Stats. 172), provides * * "That when the land in the said Territory shall be surveyed under the direction of (the) government of the United States, preparatory to bringing the same into market, sections numbered sixteen

and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same."

Reservation of school sections.

This was a reservation, not a grant. Said sections remained the property of the United States, and while the purpose of the reservation was indicated, the power remained in the government to make any other disposition of said sections it might subsequently deem advisable.

The act entitled "An act to enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States," approved March 3, 1875, in section 7, provided, "That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools."

Section 15 of the same act further provides, "That all mineral lands shall be excepted from the operation and grants of this act." (18 Stats. 474.)

Prior to said act of 1875, Congress had, by acts of July 26, 1866, and May 10, 1872, indicated its policy concerning mineral lands, and provided that they should not be disposed of except as specially provided by law.

Colorado was admitted as a State by proclamation of the President, August 1, 1876 (19 Stats. 665), pursuant to the provisions of said act of March 3, 1875.

When grant takes effect.

In the present case it is immaterial whether the land was known as mineral prior to the survey or subsequent thereto, provided it was so known prior to the admission of the State into the Union, for at that date, and not sooner, said grant took effect as to non-mineral lands in said sections, which had then been surveyed.

The grant, as to such sections surveyed *subsequent* to the

admission of the State, took effect at date of the approval of the survey by the United States Surveyor-general.

In the case now under consideration the land was known to be mineral prior to both survey and admission of the State, and it is immaterial that the surveyor did not discover its true character.

It is also immaterial that said land was not worked and developed for its mineral until a recent period, for said act of March 3, 1875, does not provide that land which is worked for minerals shall be excepted from the grant, but " all mineral lands," whether worked or not.

The land in question is clearly not within the grant to Colorado for school purposes, but is government land and subject to sale only under her laws.

The claim of the State is accordingly rejected. You will give due notice hereof to all parties in interest, allow sixty days for appeal, and thereafter promptly report action to this office.

Exception in patent.

Protests from claimants to mines within the town limits against granting a patent to said town which does not except therefrom specifically all surface ground embraced in such claims, and alleging location prior to town occupation, have been received at this office. Should the town make entry and patent issue thereon, it will contain only the following exception: "*Provided*, that no title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession, held under existing laws; and *provided further*, that the grant hereby made is held and declared to be subject to all the conditions, limitations, and restrictions contained in section 2386 of the Revised Statutes of the United States, so far as the same are applicable thereto."

In case of the Townsite of Central City, Colorado,* decided by this office December 23, 1875, and decision affirmed by the Honorable Secretary of the Interior, June 7, 1876, it was held that town-site entry could be made of land overlying lodes or veins and that patent should issue for such town site with said reservation only. Since the date of said

* No. 12, Miscellaneous.

decision this rule and practice has uniformly and without exception been followed, and under it the owner of a mining claim is secured in all those rights intended to be granted by the law.

You will notify the State that, should it file a written waiver of appeal from this decision, the case will be closed and the town authorities permitted without further delay to proceed with their application for patent.

Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 4. Sections sixteen and thirty-six, containing deposits of *coal*, are mineral in character, and do not pass to the State of Colorado under the school land grant.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 30, 1877.

Register and Receiver, Denver, Colorado.

GENTLEMEN: With your letter of the nineteenth instant you transmitted the application of Michael B. Fox and Thomas M. Patterson to enter the south-east quarter of section sixteen, township one south, range seventy west, as coal land.

You refused this application for the reason that the tract applied for is a school section.

The question is presented whether lands which fall within sections sixteen and thirty-six pass to the State of Colorado under the act of Congress, approved March 8, 1875, 18 Stat. 474, entitled "An Act to enable the people of Colorado to form a Constitution and State Government; and for the admission of the said State into the Union on an equal footing with the original States," where the same contain valuable deposits of coal.

The seventh section of said act provides "that sections numbered sixteen and thirty-six, in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other land equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools."

Section fifteen of said act provides "that all mineral lands shall be excepted from the operation and grants of this act."

The words "*mineral land*," as they occur in the several acts regulating the disposal of the public domain, are used in contradistinction to the words "*agricultural land*."

That lands containing valuable deposits of coal have been considered and treated as *mineral lands* is evident from the text of the act of July 1, 1864, 13 Stat. 343, entitled "An Act for the disposal of coal lands and of town property in the public domain," viz.: "That where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which as "mines" are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary private entry," etc.

The Revised Statutes of the United States provide for the sale of coal lands under the general term "Mineral lands and mining resources." *Vide* title 32, chapter 6, R. S.

Coal is a mineral.

The Honorable Secretary of the Interior, on the seventh of May, 1875, affirmed the decision of this office in case of James P. Hogden et al. v. The State of California, and held that mineral lands did not pass to the State of California under the act of third of March, 1853, entitled "An Act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," 10 Stat. 244, and that *coal lands are mineral lands*.

It is therefore held that sections sixteen and thirty-six, in the several townships, do not pass to the State of Colorado under the act of third March, 1875, if the same contain valuable deposits of coal.

You will therefore allow said applicant to file upon and enter said tract upon full compliance with the law and instructions, should no appeal be taken from this decision within sixty days from the date of your notification to all parties in interest. * * * *

Very respectfully,

J. A. WILLIAMSON, *Commissioner*.

No. 5. Salt springs in the State of Colorado are not subject to sale under the laws providing for the disposal of the public lands.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., February 13, 1877.

SIR: I have considered the case of C. L. Hall v. A. T.

Litchfield et al., involving the right to enter the south-east of south-east quarter section 36, township 12 south, range 77 west, the east half of north-east quarter of section 1, township 13 south, range 77 west, the south half of south-west quarter, and the north-west of south-west quarter of south-east quarter of section 31, township 12 south, range 76 west, Fair Play, Colorado.

You reject the application, and hold that the salt spring, situated on section 6, township 13 south, range 76 west, "with the six sections adjoining and as contiguous as may be," should be reserved for the use of the State of Colorado.

The reasons for your decisions are given at length, and are sufficient to justify the conclusions reached by you.

In addition to the reasons given, it may be proper to state that the spring in question is situated in that portion of Colorado included within the limits of the Louisiana purchase of 1803.

By the tenth section of the act of March 3, 1811, salt springs, and the lands contiguous thereto, were, by the direction of the President of the United States, to be reserved for future disposal of the States.

This policy of reservation has uniformly and consistently been applied by the Government to said Territory, as well as the other territory of the United States.

The applicants are in no way protected by the proviso in section eleven of the act of March 3, 1875, providing for the admission of Colorado into the Union, viz.: "That no salt spring or lands, the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State."

No vested rights could be obtained by any individuals under the laws for the disposal of the public lands. The rights to be protected were those recognized by treaty stipulations. Morton v. Nebraska, 21 Wall. 660.*

**Reserved by the United States.*—The policy of the government since the acquisition of the north-west territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. This policy has been applied to the Louisiana territory, acquired from France in 1803, and probably would apply to Nebraska without the act of July 22, 1854; but that act applies, at least, so far as to render void an entry where the salines, at the time, had been noted on the field-books, were palpable to the eye, and were not first discovered after entry. Morton v. Nebraska, 21 Wall. 660.

Your decision is affirmed, and the papers transmitted with your letter of June 21, 1876, are herewith returned.

Very respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

No. 6. The State of California is not entitled to select other lands in lieu of sixteenth and thirty-sixth sections decided to be mineral in character.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 29, 1878.

Register and Receiver, Shasta, Cal.

GENTLEMEN: With your letter of the twenty-sixth of October last, you transmitted an appeal taken by the State of California, from your refusal to file an application on the part of the State to select and locate as indemnity school lands the N. W. ¼ of N. W. ¼, and S. E. ¼ of N. E. ¼ of section 22, and the S. E. ¼ of S. W. ¼ of section 14, township 27 N., range 7 W., M. D. M., in lieu of one hundred and twenty acres in section 36, township 31 N., range 6 W., and also the W. ½ of S. W. ¼ of section 14, township 29 N., range 6 W., M. D. M., in lieu of 68.02 acres in said section 36, and 11.98 acres in section 36, township 31 N., range 7 W., M. D. M.

The records of this office do not show that any land in section 36, township 31 N., range 7 W., M. D. M., has been lost by the State.

The records of this office show that three mineral entries have been made at your office for lands in section 36, township 31 N., range 6 W., M. D. M., viz.: Dixon and Cooper, placer lot No. 37, 20 acres; Horsetown placer claim, lot No. 41, 34.36; Piety Hill placer claim, lot No. 38, 183.66. Aggregating 188.02 acres.

The plat of said township 31 N., range 6 W., was approved June 16, 1876, and was filed in your office on the twenty-sixth of June, 1876. The entire township was returned as *mineral land.*

The applications for patents for said mines were all filed prior to the approval of the survey of said township, viz.: Lot 37, October 3, 1872; lot 38, July 25, 1873; and lot No. 41, July 6, 1875.

It has been decided by the Hon. Secretary of the Interior that "Congress, by the act of 1853, did not intend to grant, and did not grant, to the State of California, any mineral lands that by survey are shown to be in sections sixteen and thirty-six." Keystone Consolidated Mining Company et al. v. The State of California, Copp's Mining Decisions, 109. See, also, State of California v. L. J. Poley et al., 4 Copp's Land Owner, 18.

Lieu Lands.

The question is presented whether the State of California is entitled to select and locate lands in lieu of those lost to the State by reason of their being mineral in character. The seventh section of the act approved March 3, 1853, 10 Stat. 244, provides "that where any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the States in lieu thereof."

Section 6 of the act approved July 23, 1866, fourteenth statute, 218, provides that said act of March 3, 1853, "shall be construed as giving the State of California the right to select, for school purposes, other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish and Mexican authority, or by other private claims, or where such sections would be so covered if the lines of the public survey were extended over such lands."

No mention is made of these lands for such portions of the sixteenth and thirty-sixth sections as may be mineral in character. It is urged, however, by the attorneys for the State that *mineral lands are reserved for public uses*, and hence the State is entitled to lieu lands therefor.

The Honorable Attorney-general, in his opinion of fourth ultimo—Copp's Land Owner, vol. 5, page 12—states "that the words 'reserved for public uses' as employed in the sixth section of the act of 1866, were not meant to cover those lands which passed to the State of California under the swamp land act of September 28, 1850; that they refer solely to reservations made for the purposes of the general

government, and the same words occurring in the seventh section of the act of March 3, 1853, must be deemed to have the same meaning and scope."

This office must therefore deny the application of the State to select and locate lieu lands for such portions of sections 16 and 36 as are mineral in character.

You will inform all parties in interest and acknowledge the receipt hereof, allowing sixty days for appeal.

Very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

No. 7. The selection of land containing valuable deposits of petroleum by the University of California void; and the Governor of the State requested to relinquish.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 9, 1879.

Register and Receiver, Los Angeles, California.

GENTLEMEN: I am in receipt of your letter of twenty-eighth October, 1879, transmitting record of testimony taken in hearing held to determine the character of the land involved in the matter of protest of F. B. Taylor v. The State of California University, selection of N. ½ of S. E. ¼, and S. E. ¼ of S. E. ¼ of section 2, Township 3 N., R. 17 W., together with your joint opinion thereon, in which you held the land to be valuable for minerals; also, letter of twenty-ninth October, in which you state that counsel for both parties in interest personally appeared and waived right of appeal from your said decision.

It appears from the record that University selections of the State of California, covering about 160 acres of unsurveyed land in Township 3, were filed in your office March 11, 1872, and upon the filing of the township plat, December 21, 1872, the said selections were adjusted to the lines of the public survey, and approved December 6, 1872.

The land in question is described in the field notes of survey as follows: "The quality of land in township second and third rate, and much broken up by steep hills and deep ravines; in northern and southern portions, hills good for pasturage; intervening portion very rocky and covered with dense chaparral and scrub oaks on hills. In sec-

tions 1 and 2 are several oil springs, to wit, in the S. E. ¼ of section 2, and N. W. ¼ of section 1."

The testimony shows the land to be worthless for agricultural purposes, and that it has been known as valuable for petroleum since 1864. Large quantities of oil have been taken away, and since the discovery the land has been almost continuously worked for this purpose.

State selection of mineral land void.

I am therefore of opinion that the selection of this land by the State is void, the same being valuable for mineral deposits, and known to be such at the date of such selection.

Governor to relinquish.

You will call upon the Governor of the State of California to relinquish this land to the United States, and make due report of action to this office. This contest is hereby dismissed, and the land will be treated as subject to entry under the mining laws of the United States, of which you will duly notify all parties.

Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

CHAPTER XII.

AGRICULTURAL LANDS.

No. 1. Agent may execute non-mineral affidavits.
No. 2. Land from which the mineral has been exhausted subject to agricultural disposal.
No. 3. A person having claimed a tract of land as mineral, adversely to another, estopped from claiming same as agricultural.
No. 4. Construction of sec. 10, Act of 1866.
No. 5. Status of mineral land patented as agricultural.
No. 6. Mineral discovered on land entered as agricultural, prior to issue of patent.
No. 7. Mineral land subject to location when already entered as agricultural, provided patent has not been issued.
No. 8. No entry to be allowed until contest determined.
No. 9. Scoggin v. Culver.
No. 10. New claims, after party's entry has been regularly canceled.
No. 11. Agricultural land valuable for the developement of a mining claim.
No. 12. Same.

No. 1. Agent, under certain circumstances, may execute and file the non-mineral affidavit.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 20, 1873.

Register and Receiver, Ironton, Missouri.

GENTLEMEN: * * * When an entry is made by an agent who has examined the land, and his principal is not personally acquainted with the character thereof, the agent, upon filing his authority to act in the premises, and proof of the fact that his principal is not personally acquainted with the character of the land, may be permitted to make and file the non-mineral affidavit (required in agricultural entries). * * *

Very respectfully,
WILLIS DRUMMOND, *Commissioner.*

No. 2. Mineral lands, upon which the mineral product has been exhausted and the mines abandoned, are subject to agricultural entry, if claimed in good faith.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., May 6, 1872.

SIR: I have considered the case of James Keena, preemption claimant, v. John Dillon et al., mineral affiants, in-

volving the right to the south-west quarter section twenty-seven, township thirteen north, range eight east, Sacramento, California, coming up from your office on appeal by Keena.

Keena has valuable improvements and extensive cultivation, extending to every subdivision of the tract. His good faith and compliance with the law are not disputed, and the only question to be decided is as to the character of the land, whether mineral or agricultural.

The evidence taken on this point, though conflicting, is strongly in favor of the agricultural claimant. On September 9, 1870, to which time the case was continued by the local officers, the mineral affiants wholly made default, and Keena was permitted to make proof and payment.

Exhausted and abandoned mines.

I think it is fairly established, that though a small portion of the land at one time contained gold in paying quantities, that portion has long since been exhausted and abandoned, and that no part of the tract now contains that metal in sufficient quantities to pay for working; that nearly all the land is valuable for agriculture, and some portions are of unusual fertility.

While the mining interests are entitled to, and must receive protection against the encroachments of persons who, under the guise of agricultural claimants, seek to secure title to large tracts of mining land, the rights of *bona fide* pre-emption and homestead claimants to lands proven to be agricultural are also entitled to the same protection against adverse combinations of miners.

Your decision is reversed, and the papers in the case transmitted with your letter of the twenty-first ultimo are herewith returned.

Very respectfully,

B. R. COWEN, *Acting Secretary.*

Hon. WILLIS DRUMMOND, *Com'r General Land Office.*

No. 3. A party having claimed land as mineral, adversely to another, is estopped from claiming same land as agricultural.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, March 23, 1876.

SIR: I have considered the case of James J. Evans v.

Cornelius B. Rendall, on appeal from your decision of June 8, 1875.

The land in dispute is the W. half of the N. W. quarter of the S. W. quarter, and the S. half of the S. E. quarter of the N. W. quarter of the S. W. quarter of Sec. 35, T. 7 N., R. 12 E., M. D. B. and M., Cal.

From the papers transmitted in this case, it appears that on the twenty-first of March, 1872, Rendall made an application at the local office for a patent of certain lands as mineral lands on sections 34 and 35 in said township, including those in dispute; that on the same day Evans made an application at said office for a patent of the N. W. quarter of the S. W. quarter of said section, claiming adversely to Rendall; and that thereupon an order of suspension was issued to Evans, and their applications, with others claiming adversely to Rendall, were duly certified to your office.

In your decision of October 22, 1873, you held that Evans' application was "sufficient as a *prima facie* adverse showing," and that it would be necessary for him to commence suit in a court of competent jurisdiction to determine his right to the possession of the land in dispute, within thirty days after receiving notice of your decision.

It further appears that, in accordance with your decision, Evans subsequently commenced an action against Rendall in the district court in which said land is situated, to have his rights thereto determined, and that at the trial had in said cause it was adjudged that he had no right, title, or interest therein.

Since said trial and decision, Evans has filed a petition, accompanied with affidavits tending to show that the land is agricultural and not mineral, alleging that Rendall fraudulently seeks to obtain it from him, and asks to have the case reopened and the character of the land determined.

Rendall has filed counter affidavits, showing the mineral character of the land, his continual occupation thereof, and mining improvements thereon, valued at four thousand dollars.

Estoppel.

I am of the opinion that Evans, having once sought to obtain this land as mineral land, adversely to Rendall, is

estopped from alleging it to be of a different character; and that the decision of the court having jurisdiction of the case—that he has no right, title, or interest therein—must be considered final as to his rights thereto.

Your decision is affirmed, and the papers transmitted with your letter "N" of August 27, 1875, are herewith returned.

Very respectfully,

Z. CHANDLER, *Secretary.*

To the Commissioner of the General Land Office.

No. 4. The tenth section of the act of July 26, 1866, was intended to give to persons who had in good faith made agricultural settlements on public lands theretofore designated as mineral, but subsequently determined as agricultural, a preference right over those mentioned in the eleventh section.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Dec. 14, 1872.

SIR: I have examined the case of Ekin Smith v. Absalom Stewart, involving the right of said Smith to enter under the pre-emption law, as agricultural land, the S.W. quarter S. W. quarter section 31, T. 10 N., R. 10 E., and N. W. quarter N. W. quarter section 6, T. 9 N., R. 10 E., M. D. M., California, on appeal from your decision of August 6, 1872.

Two questions are presented on appeal, one relating to the character of the land claimed, the other calling for a construction of the tenth section of the mineral act of July 26, 1866 (14 Stat. 253), on both of which questions your decision was adverse to the pre-emption claimant.

After a careful review of the voluminous testimony taken before the local officers, I am satisfied that the land in controversy is mineral in character, and should be held for disposition under the mining statutes.

It is claimed on behalf of the pre-emption claimant, that the tenth section of the act of 1866 gave to qualified persons who had, prior to the passage of said act, made homesteads on lands theretofore designated as mineral, and excluded from survey and sale, a right of pre-emption or homestead therein, unless, before the passage of said act, valuable mines of gold, silver, cinnabar, or copper had been discovered thereon; and, further, that the subsequent discovery of such mines did not affect the right of pre-emption or homestead thus acquired.

Construction of section 10, *act of* 1866.

I fully agree with you that this is not the proper construction to be given to the act referred to. Congress did not, I think, intend in this act to do away with the well-established distinction, so long recognized by legislation, between agricultural and mineral lands, or to allow lands actually mineral to be acquired under agricultural laws. I think the object of the tenth section was to give to persons, who had, in good faith, made agricultural settlements on public lands theretofore designated as mineral, but subsequently determined to be agricultural, a preference in pre-empting or entering the land as homesteads, over those admitted to similar rights by the eleventh section.

The department has heretofore given this construction to the act in question, by approving your instructions of December second and seventh, 1871, and March 20, 1872, to the register and receiver at Stockton, California, directing the withdrawal from disposition under agricultural laws of certain lands theretofore classed as agricultural, until the non-mineral character of the same should be affirmatively established.

I therefore affirm your decision, and return herewith the papers transmitted with your letter of the twenty-sixth ultimo.

Very respectfully,

B. R. COWEN, *Acting Secretary.*

Hon. WILLIS DRUMMOND, *Com'r General Land Office.*

No. 5. Status of *mineral land patented as agricultural.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 10, 1873.

CYRUS MADDEN, Esq., *Port Orford, Oregon.*

SIR: In reply to the inquiry in your letter of June 15, 1873, I have to state that all mineral deposits discovered upon land, after United States patent therefor has issued to a party claiming under the laws regulating the disposal of agricultural lands, pass with the patent, and this office has no further jurisdiction in the premises.*

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

* Moore v. Robbins, 6 Otto, 530. *Quarter section containing lode claim.*—The patentee of a quarter section entered as agricultural land, upon which

No. 6. Provisions of section 2341, United States Revised Statutes, applied. Should mineral be discovered before patent issues, entry should be canceled.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY, June 21, 1877.

SIR: I have considered the case of Fabien Carron, agricultural claimant, v. Samuel T. Curtis, mineral claimant, involving the right to the N. W. of S. E. quarter, N. half of S. W. quarter of section 13, and the N. E. of S. E. quarter of section 14, township 18 north, range 10 east, M. D. M., Sacramento, California, on appeal from your decision of October 24, 1876, declaring said land to be mineral.

This tract was returned by the Surveyor-general as mineral, and is within a well-known mineral region.

The evidence shows that Carron purchased the possessory right to the tract in 1859, for the sum of two thousand dollars, and has resided thereon since that date, and expended in improvements several thousand dollars.

Section quoted.

Section 2341 Revised Statutes provides that "wherever, upon the land heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have the right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantities not to exceed one hundred and sixty acres, or they may avail themselves of the provisions of chapter five of this title relating to homesteads."

By the provisions of the above section, the rights of actual settlers upon lands reserved as mineral, which have been occupied and used for agricultural purposes, and upon

valid mining locations, authorized by the act of July 26, 1866, existed at the time of the entry and patent, can not be declared the trustee of the legal title for the benefit of the owner of such mining claims, inasmuch as the patent conveyed no title to such mining claims. Gold Hill Q. M. Co. v. Ish, 5 Oregon, 104.

which valuable improvements have been made, and no valuable mines have been discovered, are protected. The provisions of the statute are specific, and were evidently framed to protect the rights of those who have, in good faith, for a series of years, resided upon and improved, as agricultural lands, a portion of the public domain.

The evidence presented in this case shows that the lands in contest are valuable for agricultural purposes; but it fails to establish the fact that any valuable mines of gold, silver, cinnabar, or copper have been discovered upon said tract, and, in the absence of such proof, Carron's rights should be recognized aed protected.

The witnesses who testified in behalf of Mr. Carron were farmers and miners, who have been for a long time residents in that neighborhood and were well acquainted with the tract of land in controversy, and without exception they state that this land is more valuable for agricultural than mineral purposes.

The evidence in relation to the mineral character of the land is theoretical, and to the effect that judging from the nature of the soil, the surface of the ground, and various indications, it is probable that the blue lead passes through said tract, and if so, it is more valuable for mineral than agricultural purposes.

The section of the statute above cited provides that where lands have been occupied and used by citizens of the United States as homesteads, and for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have the right of pre-emption thereto, etc. This statute does not leave the question of the rights of the agricultural claimants of the land in uncertainty or doubt, based upon any probability, but states that if the land is properly agricultural land, and no such mines have been discovered, then the agricultural claimant shall be entitled to enter the same.

There can be no doubt in this case that the lands included in Mr. Carron's declaratory statement are properly agricultural lands, and that so far as he has improved the same, they are shown to be of that class.

Neither can there be any doubt that, although repeated efforts have been made in that vicinity to develop mines, no valuable mines of gold, silver, cinnabar, or copper have been discovered. Every effort in that direction has proved fruitless, and the capital invested has been wasted.

It is shown by the testimony that some portion of this tract is valuable for its timber, and it also appears that the mineral claimants have cut several hundred cords of wood, manufactured a quantity of shakes, and burnt quite a quantity of coal; but these are not strictly mineral improvements; the wood and coal might be used in mining operations, but without further evidence, it can not be clearly presumed that they were intended for such purpose.

From the evidence presented in this case I am clearly of the opinion that the lands included in the declaratory-statement of Mr. Carron are more valuable for agricultural than mining purposes, and that they are properly agricultural lands.

I, therefore, direct that Mr. Carron be permitted to make final proof and payment for said tracts, and if on examination of said final proof it shall appear that he is a qualified pre-emptor, that he has fully complied with the pre-emption law, patent shall issue to him for the same.

For the reason herein stated, your decision is reversed, and the papers transmitted with your letter of February 5, 1877, are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

To the Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, February 16, 1878.

SIR: I have considered the application of Joseph Tyssowski, Esq., dated June 22, 1877, for a recall and suspension of my decision of the day previous in the case of Fabien Carron v. Samuel T. Curtis, involving the right to the NW. of SE. ¼, N. ½ of SW. ¼ of Section 13, and the NE. of SE. ¼ of Section 14, Township 18 North, Range 10 East, M. D. M., Sacramento, California, and requesting that a rehearing be ordered to determine the rights of the parties thereto.

In support of the application my attention was called to certain affidavits filed by counsel in your office, August 8, 1876. Additional affidavits in support of the application were filed also August 9, 1877.

The statements contained in the affidavits filed in support of the application, are substantially the same as those found in the testimony submitted by the mineral claimants at the trial before the local officers, the nature and effect of which were fully considered in my decision, are simply cumulative on the points then presented, and can not therefore be recognized in law as a basis for a new trial.

Counter affidavits have been filed at various times by the agricultural claimant, denying all of the statements contained in the affidavits filed in support of the application.

When the statements contained in the affidavits filed in support of the application for a rehearing are considered in connection with all the facts in the case, the great length of time which has elapsed since this land was first "prospected" for mineral wealth, during which no valuable mines have been discovered, and the full opportunity afforded at the trial before the local officers of establishing the fact that valuable mines had been discovered or existed on the land, and the failure to do so, I am of the opinion that neither equity nor prudence would justify a further delay in the case.

The rights of Carron as a party who has made a homestead on the public land, are, in my opinion, fully recognized and protected by the provisions of Section 2341 of the Revised Statutes.

Application for rehearing denied.

The application is therefore denied, and my decision of June 21 last will be carried into effect. Should it be shown, however, that valuable mines have been discovered on the tract before patent issues to the agricultural claimant, no patent should issue, as such discovery would determine the mineral character of the land, but the tract should be held subject to disposal as other mineral land.

The papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

To the Commissioner of the General Land Office.

ɔ. 7. 1. Lands discovered to contain valuable mineral deposits after same ɔeen entered as agricultural, but *before* patent has issued, is subject to ral location and entry, and the agricultural entry will be canceled.

Before patent is issued, agricultural entries may be canceled to portions racing valid mining claims.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 12, 1873.

ɔn. JOHN P. JONES, *U. S. Senate.*

ɔIR: I have the honor to acknowledge the receipt of your ter of the eleventh instant, and in reply would state, that .ere valuable deposits of gold, silver, cinnabar, lead, tin, copper are discovered upon the public domain, the par- ɔs having the right of possession thereto may obtain a .tent for the same upon a full compliance with the law .d instructions from this office.

In case valuable deposits of mineral are discovered upon a legal subdivision of the public lands after the same has been entered as *agricultural*, but *before* patent has issued therefor, the parties owning the possessory right to said mine may make application for patent for the same, and the agricultural entry would be canceled to that portion of the tract embraced by said mining claim.

Very respectfully, your obedient servant,
WILLIS DRUMMOND, *Commissioner.*

No. 8. Where a contest is had at the local office to determine the character of land, no entry should be allowed by the agricultural claimant until the General Land Office has rendered a decision.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 10, 1872.

Register and Receiver, Sacramento, California.

GENTLEMEN: In response to your inquiry in letter of the tenth ultimo, I have to state that the order of the first April, 1872, referred to (requiring a decision of the General Land Office, before entry is permitted), was intended more particularly to apply to cases concerning which there was a *contest* between parties, to determine whether certain land is mineral or agricultural, a case having been received from your office during the incumbency of the late Register, in which the land was permitted to be paid for by the pre-

emption claimant, after the testimony as to the character of the land had been transmitted to this office, but before a decision thereon had been made.

In cases where there is *no contest*, and the evidence taken after due notice, either before you or the county clerk, *clearly and conclusively* establishes in your minds that the land is agricultural and not mineral, and that the claimant seeks title therefor in *good faith* for agricultural purposes, such claimant, if in other respects properly *qualified and entitled*, will have the option of entering the land at the time of making or filing this proof, or of waiting until this office shall have rendered its decision as to the character of the land.

You will be particular to have it understood that the power of this office to review, revise, or reverse your action in such cases is not taken away or impaired by this act of paying for the land, but that the claimant under such purchase only acquires a vested right on condition that this office or the department proper shall concur with the local officers in the premises, and affirm the claimant's right to the land.*

In any case where there is a *contest*, or where the *non-mineral* character of the land and the *bona fides* of the claimant are not entirely clear and satisfactory, you will not permit the entry until the testimony has been reviewed at this office, and instructions given to permit the entry.

Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner*.

No. 9. 1. Under section 2318 of the Revised Statutes, "all lands valuable for mineral" are reserved from sale, except as otherwise expressly directed by law; and whether any certain lands are mineral or agricultural in character is a question of fact to be determined by proofs, it being immaterial that the lands had been borne on the official records, and sold by the district officers, as agricultural.

2. While the *right* to a patent is equivalent to a patent issued, yet the purchase of lands containing minerals under laws governing the sale of *agricultural* lands does not vest any rights whatever in the purchaser, for mineral lands are reserved from sale; and if no right to a patent exist, none can legally issue.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, December 22, 1879.

SIR: I have considered the case of Smith Scogin v.

*Modified by circular of April 27, 1880. See No. 3, Circular Instructions.

Charles E. Culver and Lucinda Coffman, involving the mineral or non-mineral character of the W. half section 29, and all of section 30, township 2 S., range 33 W., Camden, Arkansas, on appeal from your decision of June 23, 1879, holding said tracts to be mineral, except as to the tracts covered by the homestead entry of Mrs. Coffman, and as to these, requiring her, when she makes final proof, to notify all persons alleging such tracts to be mineral, that they may appear and establish the facts.

It appears that the tracts named are embraced in the private entry of said Culver, made April 19, 1878, and that the N. E. quarter of section 29 is covered by the homestead entry of Mrs. Coffman, made December 11, 1872.

The plats of survey of this township, showing it to be agricultural land, were approved in January, 1845, and the land therein was offered at public sale in August of the same year. That not sold continued for sale at private entry, until the act of Congress of June 21, 1866, which required the public lands in the State of Arkansas to be sold under the homestead law only.

This act was repealed by that of June 22, 1876, and the lands in question were again offered at public sale (Proclamation No. 828) on February 4, 1878, and those remaining unsold were again offered for sale at private entry. On April 19, 1878, Culver made such entry of the lands in question (with others) by payment of cash, and received the usual receipt and certificate of purchase from the local officers. On June 12, 1878, these officers forwarded to you the sworn statement of Smith Scogin, deputy United States mineral surveyor, under date of May fifteenth preceding, to the effect that, in the latter part of April preceding, he was called upon to survey one or more mineral claims in said sections, which he did, and that said sections were mineral in character, and that miners had been prospecting and working the same for several months.

You thereupon ordered an investigation touching the character of said sections, and the hearing was held in the following months of July and August. The testimony shows that these sections are situate in a broken and hilly country; that they are of little or no value for agricultural purposes; and that there never have been but two agricultural settle-

ments on them, one of which has "gone to waste," and the other, that of Mrs. Coffman, has a cultivation of eight or more acres, confined to a branch bottom.

Section 2318 Revised Statutes provides that "in all cases lands valuable for mineral shall be reserved from sale, except as otherwise expressly directed by law."

Whether or not the lands entered by Culver were such lands, is a question of fact to be determined by proofs, and it is immaterial that they had been previously borne on the official records as agricultural land.

Entry in violation of law of no effect.

If, at the date of his entry, they were "valuable for minerals," they were "reserved from sale," and the action of the local officers in allowing the entry was of no effect, because in violation of law.

The claim of the appellant, that the title to these lands vested in Culver, *eo instanti* upon his purchase at "private entry," and payment of the purchase money, and that the same can not be disturbed or divested by the existence of mineral in the land, subsequently brought to the knowledge of the Government, can not, I think, be maintained, under the decisions of the courts and of this department. If "reserved from sale," these lands could neither be legally entered nor patented.

Citation of authorities.

In Stoddard et al. v. Chambers (2 Howard, 284), the court, ruling that the holder of a New Madrid certificate had a right to locate it only on public land which had been authorized to be sold, say: "The inquiry here is whether the defendant has any title as against the plaintiff, and there seems to be no difficulty in answering the question—that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when the patent issued. * * * No title can be held valid which has been acquired against law. * * * It would be a most dangerous principle to hold that a patent should carry the legal title though obtained fraudulently, or against law."

In United States v. Stone, 2 Wallace, 525, the court say: "Patents are sometimes issued unadvisedly or by mistake,

where the officer has no authority in law to grant them. * * * In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority."

In Winter et al. v. Crommeling, 18 How. 87, the court say: "But if the executive officers had no authority to issue the patent because the land was not subject to entry and grant, then it is void, and the want of power may be proved by a defendant at law." (9 Cranch, 99.)

Although these decisions, with numerous others to the same effect, hold that a patent issued in violation of law conveys no title, and will be set aside, the principle applies even more forcibly, I think, to an entry merely, where the Government retains title, and has not executed a formal instrument of conveyance; and under the same principle I held in my decision of February 16, 1878, in the case of Carron v. Curtis* (Copp, April, 1878), that, "should it be shown, however, that valuable mines have been discovered on the tract before patent issues to the agricultural claimant, no patent should issue, as such discovery would determine the mineral character of the land, but the tract should be held subject to disposal as other mineral lands."

The appellant also claims that the right to a patent is equivalent to a patent issued. This is involved in my views above expressed, because if there is no *right* to a patent, none can legally issue. Undoubtedly the courts have ruled as claimed, but their decisions are based upon the fact that the laws leading to the issue of a patent have been complied with; or, as the court say in Barney v. Dolph, 7 Otto, 652, "after the right to it is complete;" or, in Witherspoon v. Drake, 4 Wall. 200, "according to the well-known mode of proceeding at the land office, *if the party is* entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate is executed and delivered, and thereafter the land ceases to be a part of the public domain. * * * But it is insisted that there is a

* See No. 6.

difference between a cash and a donation entry—that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office, and the patent issued. * * * In neither case can the patent be withheld *if the original entry was lawful.*"

Same rule applies to "private entry."

An entry made in fraud, or in violation of law, vests no right which is equivalent to a patent, any more than a patent issued under like circumstances vests a title. Nor am I able to appreciate any difference in principle as claimed by the appellant between a cash "private entry" and an entry under other laws, as respects the right to a patent. They must each comply with the requirements of law, before any right obtains, under the rule announced in the case of Witherspoon v. Drake.*

If, therefore, the lands embraced in the entry of Culver were in fact mineral lands, they can only be disposed of under the mineral laws, and his agricultural entry should be canceled. That these lands were not valuable for agriculture, clearly appears from the testimony. It also shows that although minerals have been known to exist in the locality of the lands in question for many years, and detached specimens of floating ore have been from time to time found on the surface, and mining excitements have previously occurred, no practical operations were prosecuted prior to 1878. During the early part of that year there was much prospecting, many mining locations were made and well-defined lodes found to exist. The shaft of the "Minnesota" claim was sunk to a depth of about forty feet and about three hundred and fifty pounds of ore taken from it, which the testimony indicates to be valuable. Many other lesser shafts were sunk, and practical miners from California and Nevada testify to the mineral character of the land.

These facts tend to show that Culver made his entry with full knowledge of the mineral character of the land, and that in fact he made it for mineral, and not for agricultural purposes.

* Failure of government surveyors to segregate mineral from agricultural lands, can not operate to defeat the rights of occupant miners. Gold Hill Q. M. Co. v. Ish, 5 Oregon, 104.

After a full consideration of all of the testimony presented in the case, I am of the opinion that the tracts in question are mineral in character, and therefore affirm your decision, and return the papers transmitted with your letter of the seventh ultimo.

Very respectfully,

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 10. After party's agricultural entry has been formally canceled upon final decision that land is mineral in character, his proper course is to make a new claim and initiate a new contest.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 24, 1876.

SIR: I have considered the application of J. C. Clough et al. for a rehearing in the case of Robert Anderson, applicant for patent for lots 1 and 2 in N. E. ¼ of section 2, T. 15 N., R. 9 E., M. D. M., Sacramento District, California, received by you from Hon. A. A. Sargent, and forwarded to me with your letter of tenth instant.

Anderson made pre-emption cash entry of the land September 12, 1870. Charges of fraud in the entry being made and properly supported by affidavits, you, June 19, 1871, suspended the entry and ordered an investigation. February 7, 1872, you considered the case at length on its merits, and ordered the cancellation of the entry, deciding the land to be mineral. From this decision no appeal was taken; it became final, and Anderson's entry was formally canceled July 9, 1872.

New claim and contest.

On October 21, 1873, an application, accompanied by several affidavits, was made for a rehearing, which was considered and denied by your office in letter of March 8, 1874, and your action was, on appeal to the Department, affirmed November 20, 1875. An examination of the case fails to satisfy me that the action heretofore taken therein should be reversed, and I am therefore of the opinion that the rehearing should not be granted. If, however, Mr. Anderson thinks he can bring himself within the provisions of the law, and that the mineral in the land has been exhausted,

or that later developments have demonstrated its non-mineral character, I see no objection to his making a new claim, and initiating a new contest, after proper notice, before the local officers.

The papers in the case transmitted with your letters of March 10th and 18th, inst., are herewith returned.

Very respectfully,

Z. CHANDLER, *Secretary*.

To the Commissioner of the General Land Office.

No. 11. Agricultural land, essential to the successful working of a mining claim, and therefore more valuable for mineral than agricultural purposes, subject to sale under the mining acts.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 20, 1876.

Register and Receiver, Fair Play, Col.

GENTLEMEN: I have carefully considered the testimony and sworn statements submitted in regard to the character of the land embraced by cash entry No. 30, made by John W. Smith and Frederick A. Clark, viz.: * * *

Dumping ground.

From the testimony, these tracts appear to be in the possession of Smith and Clark, and to be only valuable for dumping grounds for their mining claim which lies to the north of said premises.

The testimony in this case shows that said tracts are essential to the successful working of said mining claims, and that they are of greater value for mining than for agricultural purposes.

On the thirtieth November, 1872, Smith and Clark made cash entry No. 30 of said tracts. It will be observed that four *twenty-acre tracts* are embraced by said entry.

Cash entries can embrace legal subdivisions only, except in case of fractional subdivisions, or where a part of a forty-acre tract is embraced within a mining claim.

Said entry will therefore be held for cancellation, and the said tracts will be subject to disposal under the mining acts. * * * Very respectfully,

J. A. WILLIAMSON, *Commissioner*.

No. 12. Lands not mineral in character, but valuable only for the development of mining claims, should be reserved from disposal under the agricultural land laws.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 3, 1876.

Register and Receiver, Marysville, California.

GENTLEMEN: I have carefully examined the papers and testimony transmitted with your letter of the twenty-fifth September, 1873, in regard to the character of the N. W. ¼ of N. W. ¼ of Sec. 26, T. 16 N., R. 6 E., Mt. Do. Mer.

The facts in the case are as follows:

The official township plat of T. 16 N., R. 6 E., Mt. Do. Mer., was filed fourteenth November, 1867.

On the seventh April, 1868, Henry W. R. Crouch filed D. S. No. 4776 upon the N. half of N. W. quarter of sec. 26, T. 16 N., R. 6 E., Mt. Do. Mer., alleging settlement in 1864.

On the eighteenth April, 1868, mineral affidavit No. 238 was filed in your office, alleging the W. half of W. half of said section 26 to be mineral in character.

On the seventeenth October, 1870, Crouch filed an abandonment to said N. E. quarter of N. W. quarter.

The first November, 1871, was fixed upon for a hearing before you, when the matter was postponed to the eighteenth December, 1871, at which time testimony was offered in regard to the N. W. quarter of N. W. quarter of said section 26, the same being the only tract in dispute.

The testimony submitted at the hearing establishes the fact that the land is of little value for agricultural purposes, and that it is bounded on the south by valuable gold-bearing gravel mines or deep hydraulic diggings, which can be successfully worked and developed only by means of tunnels passing through this land to Deer Creek, which is the only natural and practicable outlet for these mines.

It is shown that portions of the land in dispute are claimed and held by mine owners, and that several tunnels are now being run through this land for the purpose of developing and working said gravel mines.

It also appears that Mr. Crouch has conveyed by deed to the Mooney Flat Hydraulic Mining Company certain mining

rights upon the land in dispute, and that he acknowledges the mineral character of the S. half of S. half of N. W. quarter of the N. W. quarter of said section.

Agricultural land valuable for the development of mines.

The testimony in this case forces upon my mind the conclusion that this land is only valuable on account of its location with reference to said mining claims, and that it is of far greater value for mining purposes than for agricultural purposes.

Mines only become valuable when they can be developed and the precious metals extracted; and in cases of this kind, where the land is of little, if any, value for agricultural purposes, and is essential to the proper working of deep gravel mines, it should be withheld from sale under the laws regulating the disposal of agricultural lands, and disposed of only to such parties as may be entitled to the same under the mining acts of Congress.

In the case under consideration, the land will be withheld from sale as agricultural land.

You will acknowledge the receipt hereof, and inform all parties in interest, allowing sixty days within which an appeal may be taken to the Hon. Secretary of the Interior.

Very respectfully,

S. S. BURDETT, *Commissioner.*

CHAPTER XIII.

MISCELLANEOUS.

MILL SITES.

No. 1. Must embrace only non-mineral land.
No. 2. Should be recorded and located.
No. 3. Mill site adjoining end line of lode not allowed.
No. 4. Approved after exclusion of lode claim.
No. 5. Mill site and lode included in same application for patent. Expenditure on lode claim only.

EASEMENTS, EXCEPTIONS, ETC.

No. 6. Right of ingress and egress across mining locations.
No. 7. Clause inserted in mining patents protecting rights of easement and drainage.
No. 8. Clause inserted in patent protecting water rights.
No. 9. Same.
No. 10. Clause inserted in patent where portion of lode and surface had been included in prior patent.
No. 11. Excepting clause inserted in patents to railroad companies.
No. 12. Central City case. Town site and mining claim conflicts.
No. 13. Sutro Tunnel.
No. 14. Same.

VALUABLE DEPOSITS.

No. 15. Diamonds.
No. 16. Slate.
No. 17. Iron.
No. 18. Iron.
No. 19. Fire-clay.
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No. 22. Umber.
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PERSONAL QUALIFICATION.

No. 24. Citizenship—Manner of establishing proof.
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HEARINGS.

No. 28. *a.* Notice of hearing to be prepared and signed by local officers.
b. Question and answer.
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No. 34. Defective appeal.
No. 35. Defective appeal.
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No. 40. Proceedings for correction in description of patent by the issue of a new one.
No. 41. Sioux Half-breed scrip.
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No. 45. Mineral lands in Indian Territory.
No. 46. Mineral lands in military reservation.
No. 47. Repayment of purchase money.
No. 48. Mineral lands not leased.
No. 49. Taxation of mining claim.
No. 50. Definition of rock in place.
No. 51. Copper and cinnabar.

No. 1. Claimant of mill site must furnish satisfactory proof that land claimed does not contain any valuable mineral deposit.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 29, 1872.

Register and Receiver, Central City, Colorado.

GENTLEMEN: * * * The affidavits referred to do not allege the non-mineral character of said mill site, but only allege that the same "does not to his knowledge contain any *vein* or *lode* of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper."

Before patent can issue for this mill site, additional proof will be required that there are no "valuable deposits," such as placer or gulch mines, embraced within the exterior boundaries thereof. * * * * *

Very respectfully, your obedient servant,
WILLIS DRUMMOND, *Commissioner.*

No. 2. MILL SITES.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 21, 1875.

E. T. GEORGE, Esq., *Recorder Lewis District, Lander County, Nevada.*

SIR: Referring to your letter of the eleventh ultimo, I have to state that mill sites may be located under the provisions of the mining act, and if located should be recorded.

Locators of mining claims, their heirs and assigns, have the exclusive right of possession of the surface ground included within the lines of their locations, upon compliance with the laws of the United States, and with the State, Territorial, and local regulations governing their possessory titles, where no adverse claim thereto existed on the tenth of May, 1872.

The parties having the right of possession to the surface have also the right of possession to the timber growing thereon.

Very respectfully,
S. S. BURDETT, *Commissioner.*

No. 3. A mill site which abuts against the end of a lode claim can not be patented, although a mill site contiguous to the side lines (surface contiguity) may be.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 24, 1879.

Register and Receiver, Central City, California.

GENTLEMEN: In the matter of mineral entry No. 1071, in the series of your office, for the claim of James M. Freeman et al., upon the Mollie Mullen lode and mill site, being surveys Nos. 305 A and B, the plat shows that the mill site (survey No. 305 B) abuts against the end of the lode, and evidently contains within its limits the continuation thereof.

Section 2337 United States Revised Statutes provides that "where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for vein or lode, and the same may be patented therewith."

Side lines.

It has been uniformly construed by this office that land contiguous only to the surface ground of a lode claim was not within the prohibition named, and this would ordinarily occur when the mill site is located contiguous to the side lines of the surface ground.

End lines.

In this case, as has been stated, the mill site abuts against the end of the lode, and is not therefore subject to purchase and entry under said section, as now surveyed.

In view of the foregoing, the application for a patent to the mill site (survey No. 305 B) is hereby rejected, and the entry thereof held for cancellation. Duly notify parties, etc.

J. M. ARMSTRONG, *Acting Commissioner.*

No. 4. Mill site approved after the exclusion of a lode claim.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 14, 1876.

Register and Receiver, Stockton, Cal.

GENTLEMEN: On the sixteenth of January, 1873, William Patterson filed in your office an application for patent for the Patterson quartz mine and mill site.

Proof of the non-mineral character of the mill site was not filed with the application for patent, as is required in all cases of applications for patents for mill sites, under the mining act of May 10, 1872.

With your letter of the sixteenth of December, 1873, you transmitted the sworn statements of Owen Lennon and W. Fowler, in which it was alleged that said mill site embraced a portion of the Lennon lode.

On the twenty-seventh of May, 1874, you were instructed to cause a hearing to be held to determine the true character of the tract claimed as a mill site, and whether the same is of more value for a mill site or for actual mining. A hearing was held in July, 1874, after due notice to all parties in interest.

From the evidence submitted it appears that said mill site was located in 1858, and that the same has been improved to the amount of about forty thousand dollars. No part of such improvements is found upon that portion of

said mill site, claimed as the Lennon quartz mine, except a road which has been constructed across the same for the purpose of transporting ore from the north-westerly part of the Patterson mine, to the mill owned by Patterson.

The testimony in regard to the value of the Lennon mine is conflicting, but it is clearly shown that it is a gold-bearing vein, and that about two thousand dollars have been expended thereon in sinking shafts, running tunnels, and other work.

The claimants of the Lennon lode have submitted evidence to show that said Lennon lode was located and that it has been held in accordance with the local laws and customs. It is also shown that Patterson knew that O. Lennon claimed said Lennon lode at the time of the survey of said mill site.

From a careful examination of the testimony and papers submitted I am of the opinion that Mr. Patterson should receive patent for that portion of the premises claimed by him as a mill site, which is not embraced by the official survey, made of the Lennon mine, approved by the Surveyor-general, March 19, 1874, and designated Lot No. 44, T. 2 N., R. 14 E., Mt. Do. Mer.

I am of the opinion that the claimants of the Lennon mine, as described in said lot number 44, should be permitted to obtain patent therefor, upon full compliance with the law and instructions. You will inform all parties in interest and acknowledge the receipt hereof, allowing sixty days from the date of notification within which an appeal may be taken to the Hon. Secretary of the Interior, if desired.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 5. Where a party applies for a mill site and lode in the same application, the law does not require that $500 shall have been expended on the mill site, but upon the lode claim only.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 10, 1874.

W. H. Lessig, Esq., Surveyor-general, Cal.

SIR: In reply to your letter of the fourteenth ultimo, I have to state that the fifteenth section of the Mining Act of

May 10, 1872, provides: "That where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable under this act to veins or lodes."

Mill site entered without expenditure of five hundred dollars thereon.

If, therefore, a party who has improved, held, and worked his mine in accordance with the local law and congressional enactments, and who has expended in actual labor and improvements thereon an amount of not less than five hundred dollars, desires to include in his application for patent therefor "non-mineral land not contiguous to the vein or lode "which" is used or occupied by the proprietor of such vein or lode for mining or milling purposes," it will only be necessary for such applicant to furnish evidence that five hundred dollars have been expended upon the lode claim.

In other words, where a party applies for a lode claim and mill site in the same application, the act does not require that five hundred dollars shall have been expended upon the mill site, but upon the lode claim only.

Five hundred dollars to be expended on claim.

The Mining Act of May 10, 1872, provides for patenting: 1. Lode claims; 2. Placer claims; 3. Mill sites, and 4. Lode claims and mill sites; and the plat and field notes of survey of either of these classes of claims should show that an amount of not less than five hundred dollars has been expended upon the claim in actual labor and improvements.

Very respectfully, your obedient servant,

WILLIS DRUMMOND, *Commissioner*,

No. 6. The right of ingress and egress to and from a claim, across the location of a mining claim, is reserved by a clause inserted in a patent to the mine.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 2, 1878.

Hon. T. A. Hendricks, Indianapolis, Ind.

SIR: I am in receipt of your communication of tenth of

September last, indorsed on the letter of September 2, from W. C. Hendricks, of Oroville, Butte County, California, in which he states he is the owner of a piece of mining ground entirely surrounded by the Spring Valley Mining and Irrigating Company's claim in Townships 20 and 21 North, of Range 4 E., M. D. M., Butte County, California, and asks that the reservation of an easement securing him the right of way for ingress and egress across said surrounding claim be inserted in any patent issued to said company.

Right of ingress and egress—Easement clause inserted in patent.

In reply, I have to say that in the absence of the necessary legislation by Congress, the right sought by Mr. Hendricks would be protected by the laws of California. See Revised Statutes of the United States, section 2338; and in any patent issued to the aforesaid company the following clause would be inserted: "That in the absence of necessary legislation by Congress, the Legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development." The same clause would be inserted in any patent issued to Mr. Hendricks. No specific condition referring to said claim would be stated in the patent. Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 7. 1. The right to construct a ditch or flume is not properly an adverse claim.

2. A clause is inserted in all patents for mining claims, protecting the rights of easement, drainage, etc.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 16, 1871.

Register and Receiver, Helena, Montana.

GENTLEMEN: I have had under consideration the papers submitted with the register's letter of eighteenth February, 1871, in the application made by Jessie F. Taylor and Jerry G. Smith for a patent under the mining law of ninth July, 1870, for 29 19-100 acres of placer mining ground.

* * * * * * *

The foregoing objections of Bernard Collins and Nicholas Wall do not, in the judgment of this office, constitute such an adverse interest as is contemplated by said sixth

section. They claim none of the mining ground included in said application for patent, but simply that they have a right to construct a drain ditch and bed-rock flume through or across it, to connect with their dumping-ground, as aforesaid; and no suspension of proceedings will be ordered in consideration of the foregoing objections.

However, lest there exist any misapprehension upon the subject, it is thought proper to state, and you will be particular to so inform all the parties in interest, that in every patent issued by this office, for either a lode or placer claim, a condition, in view of the fifth section of the mining act, is inserted as follows, viz.:

Clause inserted in all patents.

"That in absence of necessary legislation by Congress, the Legislature of ——— may provide rules for working the mine hereby granted, involving easements, drainage, and other necessary means to its complete development."

It is believed that this condition gives to the legislature of the State or Territory in which a patented claim is situated, ample power and authority for the enactment of all necessary rules and regulations for the proper working and development of the mines, and this as completely in regard to water ditches and flumes, as in any other respect; and if parties have, by virtue of compliance with local laws, customs, or regulations of miners, or by decisions of courts, acquired the right to construct and maintain ditches or flumes across the mining grounds occupied by others, it is not perceived how their rights in this respect will be impaired by the issuing of a patent, or that, if necessary, the aid of the courts may not be invoked, as well after the issuance of a patent as before it.

* * * * * * *

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 8. Clause inserted in mineral patents protecting and reserving *water rights.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 21, 1872.

Hon. A. A. SARGENT, M. C., *Washington, D. C.*

SIR: I have the honor to acknowledge the receipt to-day,

by reference from you, of a letter bearing date the twelfth instant, from George E. Williams, Esq., of Placerville, California, recommending an excepting clause to be inserted in patents issued for lands in the mineral regions, for the protection of rights for the use of water ditches, etc., in which you concur.

In response, I would state that this question came before me for consideration several weeks since, and although from an examination of the ninth section of the mining act of July 26, 1866, and the seventeenth section of the amendatory act of July 9, 1870, I am satisfied that rights to the use of water for mining, manufacturing, agricultural, or other purposes, and rights for the construction of ditches and canals, used in connection with such water rights, are fully protected by law; yet, in order that all misapprehension that might exist between the holder or claimant of such right and such patentee might be set at rest, it was determined, in all patents hereafter granted in mineral regions of the United States, to insert an additional clause or condition, expressly protecting and reserving such water rights, and making the patent subject thereto, the same as before it was granted.

The blank forms for this patent are now being printed, and will be ready for use in a day or two, pending the receipt of which, the granting of patents in the mineral region for agricultural lands will be temporarily suspended.

I am, sir, very respectfully, your obedient servant,

WILLIS DRUMMOND, *Commissioner*.

No. 9. The right of a claimant to a particular water ditch or canal in California is regulated by the customs, laws, and courts of California.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, November 23, 1869.

Mr. R. L. M. CAMDEN, 326 *Walnut St., Philadelphia, Pa.*

SIR: Referring to your letter of the twenty-second, concerning a ditch or canal owned by you in California, submitting the query whether your rights to the property are not fully protected by the ninth section of the act of July 26, 1866, commonly called the mining act, I have to state that the statute referred to is the result of a policy on the part of Congress, seeking to harmonize the right of

sovereignty of the soil, inherent in the general government with certain possessory rights growing out of the peculiar condition of things found in the mining States and Territories of the west, which had become engrafted upon the public lands through the operation of local customs and legislative enactments. Its object is to furnish a method of dealing with these conflicting interests so as not to impair the validity of either. It recognizes and preserves such possessory claims as are valid and effective under local regulations, but it does not create them. It substantially embodies a stipulation that the general government, in disposing of the public domain, will proceed in such a manner as to protect such rights of possession to the same as claimants may be entitled to, under such local customs, or laws, at the time of the sale by the United States. But these rights derive all their vitality from local regulations, the act of Congress imparts none. It respects those existing at the date of the sale of the public lands, but superadds nothing to their efficiency under the local laws. Take away the regulations adopted by miners' meetings or local legislatures, and all rights acquired under them in respect to lands remaining unsold must fail.

Water rights upon public lands.

If, therefore, you inquire to what extent the ninth section of the mining act protects your property in certain water rights in California, or in a particular mining ditch or canal, the answer is, that in disposing of the public lands, upon which said canal is located, the United States will, under said ninth section, maintain and protect such rights in the same as have vested and accrued by priority of possession, and which at the time of such disposal are recognized and acknowledged by the local customs, laws, and decisions of the courts of California.

In the opinion of the Commissioner, therefore, your rights in the matter of the canal are primarily regulated by the customs, laws, and courts of California; and the only protection the act of July 26, 1866, can render you, is in upholding the integrity of these so far as they may constitute the foundation of any right you may have in or to such canal, when the general government grants the lands upon which it is located, with this addition, that during the time

intervening between the passage of the mining act and the disposal of the land by the United States, you can not be held as a trespasser on it in respect to any rights thus secured to you by such customs and laws of California, or decisions of its courts.

Very respectfully, etc.,

JOS. S. WILSON, *Commissioner.*

No. 10. Excepting clause inserted in patent where portion of lode and surface ground had previously been patented to another company.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., March 4, 1875.

SIR: I have examined the appeal from your decisions of August 4 and 17, 1874, in the matter of the application for patent by the owners of the "Seven-Thirty" lode, Central City, Colorado.

The record shows that the claimants have fully complied with all the requirements of the act of 1872, under which the application was made, and that no adverse claim was filed within the period of publication.

The survey of the Seven-Thirty claim shows a partial conflict as to surface ground with the patented claim of the International Mining and Exchange Company (Hercules lode), and you find from the record and the files of your office, as a matter of fact, that the said Hercules lode leaves the surface ground patented to said company, and extends under the surface ground of the Seven-Thirty claim. You accordingly directed that a patent issue to the claimants in conformity to their survey, with a reservation excepting that portion of the surface ground in conflict, and excepting, also, the lode already patented to said International Company.

Appeal has been taken from this decision, and the exception mainly relied upon is your direction that, in the patent to be issued to the Seven-Thirty, the lode patented to the International Company shall be reserved.

The second section of the act of July 26, 1866, under which the International made its location, authorizes the patentee to follow the vein or lode, "although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." This provision certainly makes it

proper to recite the "condition" in the patent for the "land adjoining," whether it is absolutely necessary to make such recital or not. It may be that the law would sufficiently protect the patentee without any such recital, but I think it can do no harm to insert it, and that the Land Office may properly make the insertion whenever it is shown, by its own records, that there has been a previous patent for a mineral lode on land adjoining that applied for.

You directed that the exception should be in these words: "Excepting from this conveyance the surface ground and lode conveyed to the said International Mining and Exchange Company by said patent, dated September 3, A. D. 1872."

It is objected to this form of expression, that it finds that the lode referred to does run under the premises of the Seven-Thirty, and that you have no right to find such a fact.

I am of opinion that the rights of all parties will be protected by inserting in the patent to the Seven-Thirty the following clause, which is hereby directed to be done, to wit: "Excepting from this conveyance the surface ground conveyed to the said International Mining and Exchange Company by its patent, dated September 3, A. D. 1872, and also excepting from this conveyance so much of the Hercules lode, if any there be, as was legally conveyed to the said International Mining and Exchange Company by its aforesaid patent."

To this extent I modify your decision. The papers transmitted with your letter of December 1 last are herewith returned. Very respectfully,

C. DELANO, *Secretary.*

To the Commissioner of the General Land Office.

No. 11. Excepting clause inserted in patents to railroad companies.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 21, 1877.

Register and Receiver, Marysville, California.

GENTLEMEN: Referring to your letter of the fifth ult., I have to state that all patents issued to the California and Oregon R. R. Co. contain a clause in accordance with the

requirements of law, as follows: "Excluding and excepting from the transfer by these presents 'all mineral lands,' should any such be found to exist in the tracts described in the foregoing; but this exclusion and exception, according to the terms of the statute, shall not be construed to include coal and iron lands."

The fractional E. ½ of Sec. 5, T. 15 N., R. 6 E., Mt. Do. Mer., was patented with other lands to the California and Oregon R. R. Company on the seventh March, 1875, but under the law, no title was thereby acquired to *mineral lands other than coal and iron.* If, therefore, mining claims existed upon said tract, no title to the same has been acquired by said company, but, on the contrary, the title thereto remains in the government.

Should parties who have the possession and the right of possession to mining claims upon said tract desire to secure titles thereto, you will receive their applications for patents therefor.* Very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

No. 12. Central City town site. Town-site surface occupation of lode claims.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 23, 1875.

Register and Receiver, Central City, Colorado.

GENTLEMEN: Town-site entry No. 211, of Central City, made May 27, 1874, amendatory of entry No. 148, made May 16, 1873, has this day been approved, and patent will issue therefor in due course, but with a proviso in the following form:

Proviso inserted in town-site patent.

"*Provided,* that no title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession, held under existing laws; and *provided further,* that the grant hereby made is held and

* The clause in the patent of the United States to the Western Pacific Railroad Company for land granted to aid the construction of its railroad, which excepts "all mineral lands, should any be found to exist in the tracts described," is equivalent to an exception of all the subdivisions which were mineral lands. "In other words, the patent grants all of the tracts named in it which are not mineral lands." McLaughlin v. Powell, 50 Cal. 64.

declared to be subject to all the conditions, limitations, and restrictions contained in section two thousand three hundred and eighty-six of the Revised Statutes of the United States, so far as the same are applicable thereto."

Section 2386, above quoted, is in the following words: "Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired, shall be subject to such recognized possession, and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes, as against the United States."

On behalf of certain alleged mining interests, John A. Dix, Esq., et al., protest against the issue of patent to the town, unless the following exception, or one equivalent thereto, is inserted therein, to wit: "*Provided*, That no title shall be acquired under this patent to any mine of gold, silver, cinnabar, or copper, nor to any surface ground over any such mine, or within fifty feet on each side of the same throughout the length of the vein, which said surface ground shall be reserved, and shall be sold with the mines for the special use and working thereof, at not less than —— dollars per acre."

I am of the opinion that this form of exception is objectionable, that it is not in conformity with law, and that its insertion would tend to cloud the title of the grantees under the town patent, without assuring or securing to mineral claimants the particular benefits or privileges evidently intended to be compassed by its terms. It is to be borne in mind that this office is not vested with a discretionary authority in the matter of the disposal of the public lands. It can neither grant without express authority of law, nor can it limit or qualify by form of conveyance, the substance, conditions, or extent of the subject-matter granted, save as the same may be authorized to be done by express legislation. The proviso proposed by this office to be inserted and above quoted, embraces by recitation and reference all that Congress has seen fit to enact by way of qualification in the matter under consideration, contains all of that to which appeal can be had, should the courts be applied to

for the settlement of conflicting claims, and must therefore be held to be the limit of executive authority.

Towns in mining localities.

The town-site laws clearly contemplate that towns will exist in mining localities; by clear implication town-site entries are to be permitted on mineral lands. This is indicated by the clause excepting title to mines from the title acquired by the town. It is inevitable that where the surface is suitable, it will, in a mining vicinity, be populated, and attain the character of a town or city. Where any branch of business flourishes, there capital and population will concentrate. The various trades and callings will center there. Hotels will be a necessity. Dwellings will be built, and permanent homes established; all the various interests which constitute valuable property rights as connected with the soil will be created. And this is not necessarily antagonistic to the miners. The protection of municipal government is in the miner's interest, as it is in the interest of any other class of business men.

In the case of Theodore H. Becker v. Citizens of Central City, Colorado, Becker was a mineral claimant to three thousand linear feet of the Gunnell Extension or White Lode, under act of July 26, 1866. He claimed compliance with law and was opposed by certain citizens of the town who represented that said lode extended to a considerable distance under town lots and improvements owned and occupied by them in said city. In this case the Honorable Secretary of the Interior decided, August 7, 1871, that "in the present case the application for a patent includes the surface and soil as well as the mineral. I am of the opinion that the persons in possession of this surface are adverse claimants within the meaning of this law and are entitled to be heard in the local courts before a patent is issued."

Proviso inserted in mining patents.

The exception in the mining patents, for claims within the exterior limits of a town, having in view the legality of the possession of the surface ground by the inhabitants, is as follows, to wit: "Excepting and excluding, however, from these presents, all town property rights upon the surface, and there are hereby expressly excepted and excluded

from the same all houses, buildings, structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above described premises, not belonging to the grantees herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same." By this exception the surface in the actual possession and occupation of the mine owner, or covered by his improvements, is as distinctly assured and conveyed to him, as is that surface to which town property rights have attached, or on which improvements by other parties have been placed excepted from his patent. I regard these correlative exceptions, inserted in the town-site and mineral patents, as securing the objects contemplated in the town-site and mineral laws. They assure to all parties just what, under the law, they are respectively entitled to claim. To grant to the miner the entire surface ground, along the whole line of the lode, with a width of one hundred feet, without regard to the acquired surface rights of others, would compel me to ignore the principle announced in said decision of the honorable secretary, as well as to do violence to my own judgment, of the proper construction of the two laws under consideration. They must be so construed that both may stand.

Under the system established as aforesaid, of inserting said exceptions in the patents to towns and mine owners, there are no occupants in Central City presenting their claims adversely in the manner provided in the mining statutes, and for the reason that, by said exception, the rights of all parties are respected and so defined that they are easily susceptible of definite ascertainment. To except from the town patent definite surveys of mineral claims, initiated or extended after surface occupation by other parties, would obviously be ignoring, to an unjustifiable extent, adverse *rights* which have not been presented for adjustment, by the courts, prior to the mineral entry, simply for the reason that under the practice of this office, indicated by said exceptions, it was wholly unnecessary. This non-action was based on the practice of this office, on which they had the right to rely, and no power to control, and this practice itself was based on the reasonable and essentially necessary construction of the town-site and mineral laws, whereby

both might be executed and claimants under them secured in such rights as they had respectively acquired. It should also be remembered, in this connection, that the government does not act upon the individual claims of town occupants, but does adjust and patent mineral claims directly to the mine owners.

The request of the mineral claimants, however, as presented in their protest and claim now under consideration, constitutes a proposition never hitherto before this office for decision. It is in brief, that every mine discovered or hereafter to be discovered, throughout its entire length, with a width of one hundred feet, surface ground included, be excepted from the town patent.

Where and when will these mines be discovered and opened? What and whose property will they then embrace and practically confiscate? What foot of surface ground will ever be held by a town occupant under a clear title where the same is not purchased from the mine owner? Was the mineral law designed by Congress as a repeal of the town-site statutes? These points would assume vital significance were the present claim conceded.

The town of Central City was incorporated in 1864. The first patents were issued to mine owners in 1869. Precisely *when* mining claims attached to any particular piece of ground I can not determine. Precisely *when* a legal surface claim by a town occupant attached to any particular lot I have no means of ascertaining. How, then, with deference to those laws under which these claims have attached, can I defer the one absolutely to the other?

The necessity of so construing both laws as not to defeat either; that respect for rights under each, which, of itself, it seems, must control my action; the fact that the exceptions in mineral patents secure a shield or protection to town occupants and mineral claimants alike, and on which town occupants have relied, and that the exception in the town-site patent is as broad as the law suggests, and almost in its exact language, render it improper for me to grant the present claim.

The mine owner is protected by the local rules and customs, and these are recognized by the United States. The town patent is executed as a trustee, who is controlled by

the legislature of his State or Territory. The local courts are open for those particular adjustments which this office can not reach; and I conclude that the present demand is entirely outside what, in the proper execution of said laws, can be legitimately claimed or conceded. I therefore decline to grant the application; and in conformity to the views herein set forth, I hereby revoke my letters to the Register and Receiver, of August 26, 1874, and to John A. Dix, Esq., of April 24, 1875, so far as they conflict with this decision, and decline to except by name and survey any mine whatever in said town.

Duly notify all parties in interest hereof, allow sixty days for appeal, and thereafter promptly report to this office.

Very respectfully,

S. S. BURDETT, *Commissioner.*

No. 13. SUTRO TUNNEL.

1. The words "discovered" and "developed" have separate and distinct meanings. Known lodes when intersected by the main tunnel might be greatly benefited and "developed" thereby.

2. Right was given to construct a tunnel along any lode discovered or developed by the main tunnel.

3. The fact that a mine is located more than two thousand feet from the main tunnel will not prevent the Sutro Tunnel Company from collecting royalty from the owners thereof, *provided* it can show conclusively that the mine has been drained, benefited, or developed thereby.

4. At whatever distance, if the mine is so benefited, etc., the condition should be inserted in the patent.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, August 30, 1878.

SIR: I have considered the case of the Sutro Tunnel Company v. the Occidental Mill and Mining Company, situated on the Brunswick lode, Silver Star Mining District, Storey County, Nevada, on appeal from your decision of December 4, 1877, adverse to the Occidental Company.

The facts of this case are as follows, viz.: On September 10, 1873, the Occidental Mill and Mining Company made proof of their compliance with the requirements of the mining laws, and entered the lands embraced in the mill and mining claims of said company, containing 34 67-100 acres in the E. half of S. W. quarter section 33, township 17 N., range 21 E., and sections 4 and 9, township 16 N., range 21 E., Mount Diablo Meridian. On June 5, 1875,

Messrs. Shellabarger and Wilson, attorneys for the Sutro Tunnel Company, filed the following protest against the issuance of patent for the Occidental Mine, viz.: "The Sutro Tunnel Company, as assignee and successor in interest of A. Sutro, under the act of Congress of July 25, 1866, entitled 'An act granting to A. Sutro the right of way and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada,' respectfully shows that the claim described as above in the application made and now pending in your office is either within two thousand feet of the tunnel of said company, and therefore, under the provisions of said act, not patentable, or else is within that district in which all claims or mines will be drained, benefited, or developed by said tunnel, and the owner of said claim holds the same subject to the condition named in the third section of said act.

"And said Tunnel company hereby demands that if said claim is within the two thousand feet aforesaid (such fact being ascertainable by the public records), no grant or patent be issued therefor, and hereby protests against the issuing of any such grant or patent; or if said claim is not within the said limit of two thousand feet, the said Tunnel company hereby demands that the condition named in the third section of the act be inserted in any grant from the United States for said claim without the insertion of said condition."

On August 14, 1876, Messrs. Shellabarger and Wilson, on behalf of said Tunnel company, filed a statement, in which they alleged that the Occidental mine was on a lode which had already been drained by the Sutro Tunnel, in consequence of which this mine, which for a long time had been flooded with water, had been thoroughly drained, which fact had been recently discovered; they therefore asked that a hearing be ordered to enable them to prove said allegations.

By your letter of August 19, 1876, a hearing was ordered before the local officers, to determine whether this mine had been drained, benefited, or developed by the Sutro Tunnel. The hearing commenced before the local officers on October 4, 1876, but the testimony was not transmitted

to your office until November 9, 1877. Much of this testimony was not signed by the witnesses, and lacked the jurats of the local officers, and you refused to consider it as evidence in the case. Your action in rejecting said testimony is approved, for the reasons stated.

Commissioner's decision.

You decided that although the testimony did not conclusively establish the fact that said mine had been drained, benefited, or developed by the tunnel, the Tunnel company had nevertheless made out a *prima facie* case, and were entitled to have the condition contained in the third section of the Sutro Tunnel Act of July 25, 1866, inserted in the patent to be issued for said mine, and the right of the tunnel company to royalty could then be settled by the courts.

On February 25, 1869, your predecessor, Mr. Commissioner Wilson, addressed a letter to Mr. Sutro, in which he discussed at length the rights and privileges granted by the Tunnel Act of July 25, 1866, and held that the only mines or lodes affected by said act were the following:

"1. The mines on the Comstock lode. 2. Those lying within two thousand feet of the proposed line of said tunnel. 3. Such new lodes as may be discovered or developed by the construction of the tunnel, the existence of which remained unknown until thus brought to light."

This decision was affirmed by my predecessor, Secretary Cox, on July 5, 1870.

It is contended by counsel for the mining company that the above mentioned decision is final and conclusive against the tunnel company, upon the points raised in this controversy, and that said questions are *res judicata.*

Mr. Bouvier (2 Law Dict. p. 465) states the law of *res judicata* to be as follows: "In order to make a matter *res judicata* there must be a concurrence *of the four conditions* following, viz.: Identity of the things sued for, identity of the cause of action, identity of the persons and parties to the action, identity of the quality of the persons for or against whom the claim is made."

The records of your office show that the decision of Commissioner Wilson was drawn out by letters from Mr. Sutro, relative to his rights under the tunnel act. The Occidental

Mill and Mining Company was not a party to that proceeding, and is not, therefore, estopped by it; neither can said company take advantage of said decision by way of estoppel, because it was a stranger to the record.

Questions discussed.

The questions involved in this case may be briefly stated as follows, viz.:

1. Has the Sutro Tunnel Company proven that the Occidental mine has been drained, benefited, or developed by its tunnel?

2. If the proof shows that the mine has been drained, benefited, or developed by said tunnel, but that it is located outside of the limit of two thousand feet named in the act of July 25, 1866, is the Tunnel company entitled to have the condition contained in the third section of said act inserted in the patent to be issued for said mine?

The testimony in this case shows that the northerly end of the Occidental mine is situated about three thousand one hundred feet in a southerly direction from shaft No. 3 of the Sutro Tunnel; that the trend of said mine is nearly north and south, the dip to the east, and that the strata of the country run nearly north and south; that said mine is worked through two tunnels; that in 1872, several miners' inches of water (174,054 gallons, or 20,333 cubic feet each) flowed from the lower of those tunnels, and was used for milling purposes by the Occidental Company; that when the pumps were at work at shaft No. 3 of the Sutro Tunnel, there was a marked diminution in the flow of water in said mine, and that the mine has now become dry; that shaft No. 3 has been sunk to the depth of four hundred and fifty-nine feet, but not to the level of the Sutro Tunnel.

It is also shown that in running the second tunnel of said mine, water was encountered at about eight hundred feet, where the ledge was struck; that there is a seam of clay from three to four feet in thickness, very close to the east casing of said mine, and that in running the Sutro Tunnel similar clay was taken out; that the mouth of the second tunnel of said mine is situated about five thousand feet from shaft No. 3 of the Sutro Tunnel, with mountains and valleys intervening. The level of the Sutro Tunnel is shown to be about one thousand six hundred feet below the upper crop-

pings, and about one thousand two hundred feet below the second tunnel of said mine; it is also shown that large quantities of water were encountered in the Sutro Tunnel from a point one thousand four hundred feet east to a point nine hundred feet west of shaft No. 3.

While the testimony presented does not show conclusively that said mine has been drained, benefited, or developed by said tunnel, I agree with you in the conclusion that it does show *prima facie* that said mine has been drained, although this conclusion is reached only by tracing effects to what must be considered their real causes.

Upon the second proposition, it is claimed by counsel for the Tunnel Company, that said condition must be inserted, because said company is authorized to run a branch tunnel on the Brunswick lode.

The first and third sections of the act entitled "An act granting to A. Sutro the right of way, and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July 25, 1866, are in the following words, viz.:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That for the purpose of the construction of a deep draining and exploring tunnel to and beyond the 'Comstock lode,' so called, in the State of Nevada, the right of way is hereby granted to A. Sutro, his heirs and assigns, to run, construct, and excavate a mining, draining, and exploring tunnel; also to sink mining, working, or air shafts along the line or course of said tunnel, and connecting with the same at any point which may hereafter be selected by the grantee herein, his heirs or assigns. The said tunnel shall be at least eight feet high and eight feet wide, and shall commence at some point to be selected by the grantee herein, his heirs or assigns, at the hills near Carson river, and within the boundaries of Lyon county, and extending from said initial point in a westerly direction seven miles, more or less, to and beyond said Comstock lode, and the said right of way shall extend northerly and southerly on the course of said lode, either within the same, or east and west of the same; and also on or along any other lode which may be discovered or developed by the said tunnel."

"SEC. 3. *And be it further enacted,* That all persons, companies, or corporations, owning claims or mines on said Comstock lode, or any other lode drained, benefited, or developed by said tunnel, shall hold their claims subject to the condition (which shall be expressed in any grant they may hereafter obtain from the United States) that they shall contribute and pay to the owners of said tunnel, the same rate of charges for drainage or other benefits derived from said tunnel or its branches as have been or may hereafter be named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode, at the time of the passage of this act." (14 Statutes at Large, pp. 242, 243.)

Under the first section, I think it is clear that neither the tunnel nor its branches can be lawfully constructed along any lode except where the right of way is granted. By the words "and also on or along any other lode which may be discovered or developed by the said tunnel," the right to construct branch tunnels is made contingent upon either the discovery or development of a lode other than the Comstock.

The record shows that the Brunswick lode was discovered many years before the passage of the act of July 25, 1866, and the Occidental mine was located thereon in March, 1863. This lode was not, therefore, "discovered" by the tunnel. This narrows the inquiry to the single question whether the Sutro tunnel has "developed" the Brunswick lode.

Developed.

Mr. Commissioner Wilson was of the opinion that the word "developed" as used in the first section of the act above quoted was simply interpretive of the word "discovered" and signified one and the same thing. I am unable to agree with Mr. Wilson's construction of this section. The words "discovered or developed" as used therein, have reference, in my opinion, to separate and distinct events, the happening of either of which was sufficient to perfect a grant of the right of way, and its necessary consequences. Many lodes had already been discovered on the line of the projected tunnel at the time the act was passed, and it is not

to be presumed that the law-makers, by the use of the word "discovered," had reference to them, or deemed them capable of discovery by the Sutro tunnel, yet there was every reason for believing that they might be developed thereby. If the word "discover" did not refer to known lodes, and the words "or developed" are subordinate to and interpretive of that word, it follows as a logical sequence that the words "and also on or along any other lode which may be discovered or developed by said tunnel," granted no right of way except along blind lodes discovered in the tunnel. Such a construction would be equivalent to a nullification of this important part of the grant. It can not be doubted that a known lode, when intersected by the main tunnel, might be greatly developed thereby; and if it was so intersected and developed, there can be no reasonable doubt that the right of way was granted for the construction of a branch tunnel along it, and the right to royalty would necessarily follow when the several mines located thereon were drained, benefited, or developed thereby.

Main tunnel.

I am of the opinion, therefore, that the right to construct a tunnel was granted along any lode discovered or developed by the main tunnel, and that this right can not be restricted unless there is something in the act which in terms, or by necessary implication, limits its operation. That such limitation does not exist is clear, I think, from the language used in the third section of the act, which provides that "all persons, companies, or corporations owning claims or mines on said Comstock lode, or any other lode drained, benefited, or developed by said tunnel, shall hold their claims subject to the condition," etc. There is nothing in this language to indicate a limitation of the right of the Sutro Tunnel Company to extend their explorations. On the contrary, the language seems to imply that those explorations may be extended to any distance, and that all persons, companies, or corporations, whose mines were drained, benefited, or developed thereby, shall be liable to pay the royalty agreed upon in the stipulation mentioned, provided always that the lode was discovered or developed by the main tunnel.

Branches.

The word "branches" indicates that it was contemplated that more than one branch tunnel would be run, otherwise the word "branch" would have been used. The fact, therefore, that the Occidental mine is situated more than two thousand feet from the main tunnel, will not prevent the Sutro Tunnel Company from collecting its royalty from the owners of said mine, providing it shall conclusively establish the fact that said mine has been drained, benefited, or developed thereby; and while it is true that the testimony in this case does not conclusively show that the Brunswick lode was cut by the Sutro tunnel, nor that the Occidental mine has been drained, benefited, or developed thereby, still it does appear *prima facie* that said lode was cut by the Sutro tunnel, and that it has been drained thereby; and as there is no limitation in the act as to the distance at which mines shall be situated from said tunnel, if drained, benefited, or developed thereby, which would exempt them from the condition of the third section, I am of the opinion that Mr. Sutro, his heirs and assigns, are entitled to have the condition provided in the third section inserted in the patent for said mine, when the same issues.

Counsel for the Sutro company urge that the condition prescribed in the third section shall be inserted in all patents for mines situated within a reasonable distance of said tunnel, whether located upon the Comstode lode or some other lode, and whether within or without the limit of two thousand feet named in the act.

I am unable to concur in this view. The right to royalty to Mr. Sutro, his heirs or assigns, was granted on the condition that the owners of mines should pay a certain royalty, providing their mines were drained, benefited, or developed by the proposed tunnel. If the mines are not drained, benefited, or developed by said tunnel, the act does not give to Mr. Sutro, his heirs or assigns, the right to collect any royalty. Whether the Sutro Tunnel Company is entitled, therefore, to such right must always be a question of fact to be established by proof; and while it is true that the condition prescribed in the third section of said act should be inserted in patents issued for mines on testimony establishing *prima facie* that said mine has been

drained, benefited, or developed, still I am of the opinion that said condition should not be inserted in any patents except in patents for mines located upon the Comstock lode, unless it be made to appear *prima facie* that the mine or mines have been drained, benefited, or developed by said tunnel.

Your decision is affirmed for the reasons stated, and the papers transmitted with your letter of March 30, 1877, are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

Commissioner of the General Land Office.

No. 14. Clause inserted in patents for mines upon the Comstock lode, in favor of the Sutro Tunnel grant.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 8, 1873.

ADOLPH SUTRO, Esq., *Washington, D. C.*

SIR: Referring to your letter of the twenty-seventh ultimo, I have to state that the Register and Receiver at Carson City, Nevada, were instructed, on the twenty-ninth July, 1870, of the construction which has been given the act of Congress approved July 25, 1866, "granting to A. Sutro the right of way and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada."

The instructions contained in said letter, of which you have been furnished a copy, are still in force.*

In issuing patents for the Comstock lode, or those in the immediate vicinity thereof, the following clause was inserted, viz.:

Condition.

"That the claim hereby granted and conveyed shall be subject to the condition specified in the third section of the act of Congress approved July 25, 1866," granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada, "and the grantee herein shall contribute and pay to the owners of the tunnel, con-

* See decision of Secretary of the Interior, August 30, 1878. No. 13.

structed pursuant to said act, for drainage or other benefits derived from said tunnel or its branches, the same rate of charges as have been or may hereafter be named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode, at the time of the passage of said act, as provided in said third section."

By reference to the inclosed circular you will perceive that both the acts of July 9, 1870, and May 10, 1872, contain clauses guarding the rights of the owners of the Sutro tunnel.

The land which is embraced by the location of the tunnel has been withdrawn from sale, in accordance with said letter from this office of July 29, 1870.

Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner.*

No. 15. Public lands containing deposits of diamonds, are subject to location and sale under the mineral laws.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., September 3, 1872.

SIR: Your letter of the twentieth ultimo, submitting for instructions the question whether "diamond claims" can be entered and patented under the mining acts of Congress, was received and submitted to the Attorney-general for his opinion thereon. I transmit herewith a copy of his opinion on the subject, under date of the thirty-first ultimo. I concur in the views therein set forth, and they will guide your official action in cases of this character. The letter of Hoyt and Sears, accompanying yours, is herewith returned.

Very respectfully,

W. H. SMITH, *Acting Secretary.*

Hon. WILLIS DRUMMOND, *Com'r General Land Office.*

[Inclosure.]

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., August 31, 1872.

Hon. C. DELANO, *Secretary of the Interior.*

SIR: I have the honor to acknowledge the receipt of your communication of the twentieth instant, submitting for my official opinion the question whether or not title to public

lands producing diamonds can be acquired by individuals or associations under the act of Congress entitled, "An act to promote the development of the mining resources of the United States," approved May 10, 1872.

Opinion of Attorney-general.

Section one of said act provides, "That all valuable mineral deposits in the lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." Section six of said act also provides the mode in which a patent may be obtained for land claimed and located for "valuable deposits."

Definition of word mineral.

Bainbridge, in his work on the law of mines and minerals, page one, says: "A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores."

Diamond.

Webster gives the following as the definition of a diamond: "A mineral and a gem, remarkable for its hardness, as it scratches all other minerals." Diamonds are found under a variety of circumstances, and are generally obtained by mining. They are procured in India and South Africa by digging pits in the earth down to a peculiar stratum called the diamond bed.

In Brazil they are washed out of an agglomerate composed of rounded white quartz pebbles and a light colored

sand. Diamonds, then, are clearly "valuable mineral deposits," and the provisions of said act are as applicable to lands containing them as to lands containing gold or other precious metals. Comprehensive words, no doubt, were used to include as well what might afterward be discovered, as what might be overlooked in an enumeration of minerals in the statute.

Argument.

Public lands, for the purposes of sale, are divided into agricultural and mineral lands. The minimum price of the former is one dollar and twenty-five cents, and of the latter five dollars per acre; mineral lands, exclusive of their valuable deposits, are generally worth little or nothing. Prior to the act of July 26, 1866 (14 Stats. 257) it was customary for persons to take those deposits without respect to the rights of the United States; Congress then provided a way in which persons locating lands for mining purposes might acquire title, and other acts have since been passed promotive of the same end. I think these acts ought to be most liberally construed, so as to facilitate the sale of such lands, for in that way and not otherwise can they be made to contribute something to the revenues of the government, and controversy and litigation in mining localities to a great extent prevented.

Very respectfully, your obedient servant,

GEO. H. WILLIAMS, *Attorney-general.*

No. 16. Public lands containing valuable deposits of slate are subject to location and sale under the mining acts.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 23, 1874.

Register and Receiver, Stockton, Cal.

GENTLEMEN: In reply to your letter of recent date, inclosing the application of S. H. Fickett, M. W. Parsons, J. Heckendorn, and R. C. Patton, for patent for the S. ½ of S. W. ¼ of Sec. 29, T. 3 N., R. 11 E., Mt. Do. Mer., containing valuable deposits of *slate*, I have to state that the act of July 9, 1870, and the act of May 10, 1872, provide for the patenting of lands containing valuable deposits, and

where such deposits are found in such quantity and quality as to render a given tract more valuable on this account than for purposes of agriculture, it may be entered under said acts.

Slate.

It appears from the papers transmitted with your said letter, that valuable deposits of roofing-slate have been discovered upon said tract, and that said applicants have expended quite a large amount in the development thereof.

You will allow said applicants to proceed with their said application, and upon full compliance with the law and the instructions, enter and pay for their claim.

You will inform all parties in interest, and acknowledge the receipt hereof.

Very respectfully, your obedient servant,
W. W. CURTIS, *Acting Commissioner.*

No. 17. Title to lands containing valuable deposits of iron may be obtained under the mining law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 2, 1874.

ANDREW I. STEWART, Esq., *Salt Lake City, Utah.*

SIR: In reply to your communication of the seventeenth ultimo, I have to state that iron lands may be patented under the mining acts of Congress. Where the iron is found in lodes or veins, or in rock in place, the proceedings to obtain patent are the same as those prescribed in the mining act of May 10, 1872, in case of vein or lode claims.

Where the iron is not found in rock in place, the proceedings to obtain government title are the same as those prescribed by said act in case of placer claims.

One of the conditions precedent to obtaining patent for a mining claim, whether vein or placer, is that an amount of not less than five hundred dollars shall have been expended thereon in actual labor and improvements.

Very respectfully,
W. W. CURTIS, *Acting Commissioner.*

No. 18. Iron.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 26, 1873.

C. C. CLEMENTS, Esq., *U. S. Surveyor-general, Salt Lake City, Utah.*

SIR: Referring to the subject of your letter of February 18, 1873, I have to state that prior to the passage of the mining act, approved May 10, 1872, lands containing deposits of iron ore were disposed of for cash at private entry, the same as agricultural lands.

The language of that statute, however, is so comprehensive as to justify the belief that it was the intention of Congress to include iron ore among the mineral deposits to be disposed of under its provisions. Congress, by subsequent legislation, appears to have placed this construction upon the act.

Michigan, Wisconsin, and Minnesota.

By an act approved February 18, 1873, it is provided that "deposits or mines of iron in Michigan, Wisconsin, and Minnesota, shall be excluded from the operations of the act of May 10, 1872." This is, in effect, saying that prior to that time deposits or mines of iron had been subject to the operations of said act in those States, and that they remain subject to its operations in the States not specifically named.

To your inquiry, I therefore reply, that lands more valuable on account of veins or deposits of iron than for agricultural purposes, can be entered upon compliance with the several requirements of the mining act of May 10, 1872.

Very respectfully,
WILLIS DRUMMOND, *Commissioner.*

No. 19. Lands valuable on account of deposits of fire-clays, may be patented under the mining law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 10, 1873.

G. BILLINGS, Esq., *Assistant Treasurer Germania Smelting and Refining Company, Salt Lake City, Utah.*

SIR: In reply to the inquiry in your letter of June 30, 1873, I have to state that lands valuable on account of de-

posits of fire-clay, may be patented, on compliance with the mining act of May 10, 1872.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 20. Lands containing valuable deposits of borax may be located and entered under the mining law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 18, 1873.

Register and Receiver, Los Angeles, Cal.

GENTLEMEN: Referring to your letter of the fourth instant, I have to state that lands containing valuable deposits of borax can not be entered under the agricultural laws of Congress.

Such lands may be entered, however, under the act of July 9, 1870, and the act of May 10, 1872, upon full compliance with the law and instructions; both of these laws providing for the patenting of lands claimed and located for "valuable deposits."

The proceedings required will be the same as are required in case of applications for patents for placer mines.

Very respectfully, etc.,

WILLIS DRUMMOND, *Commissioner.*

No. 21. Lands containing valuable deposits of mica may be entered under the mining law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 3, 1875.

WM. A. ARNOLD, Esq., *Central City, Colorado.*

SIR: Referring to your letter of the fourth August last, I have to state that lands containing valuable deposits of mica may be patented under the provisions of the mining act of May 10, 1872, upon full compliance with the law and instructions.

From the operations of the grants to the different railroad companies are excepted all *mineral lands* except those containing coal and iron, and title to mineral lands can only be acquired under said mining acts.

Very respectfully, your obedient servant,

S. S. BURDETT, *Commissioner.*

No. 22. Lands containing valuable deposits of umber may be patented under the mining law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 30, 1875.

WILLIAM CLAYTON, Esq., *Salt Lake City, Utah.*

SIR: In reply to your letter of the twentieth January, 1875, I have to state that lands containing valuable deposits of umber may be patented under the mining acts of Congress.

The price per acre depends upon the character and formation of the deposit. If it is found in veins or rock in place, the same rate per acre must be paid as in case of lode claims, viz., $5.

If the umber is not found in veins or rock in place, the proceedings would be the same as are prescribed in case of placer claims, and the rate $2.50 per acre.

It has also been ruled by this office that valuable deposits of fire-clay may be entered and patented under the mining act. Very respectfully,

Your obedient servant,
S. S. BURDETT, *Commissioner.*

No. 23. Lands containing deposits of petroleum may be entered under the mining law.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 30, 1875.

J. T. STRATTON, Esq., *Surveyor-general, Cal.*

SIR: With your letter of twelfth August last you transmitted a copy of the report of Wm. P. Reynolds, United States Deputy Mineral Surveyor, in regard to the Towsley petroleum mine, and you inquire whether lands yielding petroleum may be patented under the mining acts.

It appears from the report that D. A. Towsley et al. made location and record of their claim in 1865, and that D. A. Towsley has had uninterrupted possession thereof since eleventh March, 1865; that said claim yields five hundred gallons of petroleum daily.

Petroleum claims may be entered and patented under the mining act of May 10, 1872, upon full compliance with the provisions and requirements of said act.

Very respectfully, your obedient servant,
S. S. BURDETT, *Commissioner.*

No. 24. Manner of proceeding to establish citizenship.

The law prescribes the mode of proof, and no additional conditions can be imposed by official regulations.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 29, 1876.

SIR: I have considered the appeal of John Mooney, Roger O'Donnell, and Edward Quigly from your decision of February 21, 1876, requiring Mooney and O'Donnell to furnish certified copies of certificates of naturalization, and Quigly to furnish proof of citizenship, upon their application for a patent to mining land.

In support of their application for a patent, Mooney filed an affidavit properly executed, stating that he is a naturalized citizen of the United States, that he was born in Ireland in 1820, and that at the time of making said affidavit he was a resident of Jamestown, California.

O'Donnell filed a like affidavit, stating that he is a naturalized citizen of the United States, that he was born in Ireland in 1834, and that he was a resident of Jamestown, California.

Quigly filed an affidavit, properly executed, showing that he is a citizen of the United States; whether native or naturalized is not stated, neither is his place of residence given.

In your letter of transmittal, you state that it has been the uniform practice of your office to require the applicants for patents for mining claims who allege that they are naturalized citizens, to furnish certified copies of their certificates of naturalization. This regulation was without doubt a wise one, but is it a regulation justified by the law, or one that can lawfully be enforced, if the applicants decline to comply with the same?

Section 2312 of the Revised Statutes provides that "proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation."

From this section it will be seen that the method to be pursued for the purpose of establishing the qualification of

citizenship, is explicitly set forth, and it is not within the jurisdiction of this Department to impose an additional condition, especially if such condition is at variance with the terms of the act. I do not think the additional condition required by your office, in the matter of the proof of citizenship, can be sustained or justified by a consistent interpretation of the law.

Should it be alleged that to require less in the matter of proof of citizenship will open the door to fraud, it can only be replied that the terms of the act are clear and explicit and must be followed.

No discretion is allowed your office under the "act to promote the development of the mining resources of the United States," as to what shall constitute sufficient proof of citizenship, as in the pre-emption and homestead laws. Applicants for lands under said laws are required to be citizens, or to have declared their intention to become such, and what shall constitute proof of citizenship or declaration is a matter for the consideration of your office; but in the act under consideration, the manner of making satisfactory proof on this point is expressly prescribed.

I think the grounds of appeal from your decision are well taken; said decision is, therefore, reversed. It is competent for you to prescribe the form of affidavit to be filed by applicants, and I would suggest that in the case under consideration, and in all other cases, the applicant be required to file an affidavit showing whether he is a native or naturalized citizen, and if a naturalized citizen, stating not only the date and place of naturalization, but the court from which the certificate issued.

The papers transmitted with your letter of June 3, 1876, are herewith returned. Very respectfully,

CHAS. T. GORHAM, *Acting Secretary.*

To the Commissioner of the General Land Office.

No. 25. Women are not disqualified from making locations of mining claims.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 13, 1877.

Register and Receiver, Eureka, Nev.

GENTLEMEN: Referring to your letter of the fourteenth of

September last, I have to state that section 2319 of the Revised Statutes of the United States declares that the mineral lands of the United States shall be free and open to exploration and purchase "by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law." The law makes no distinction in this regard on account of sex.

Mining claims may be located and held by either males or females, upon compliance with law.

Very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

No. 26. Manner of proving authority to sell mining claim as executor of deceased locator's estate.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 29, 1876.

A. MORRELL, Esq., 1109 *F Street, Washington, D. C.*

SIR: * * * * In case of North-east Extension of the Yosemite Mine—mineral entry No. 113, Carson City district, Nevada—it appears by the abstract of title that D. H. Crowe was one of the locators; and it also appears that the applicant for patent claims title to said mine, under a deed dated December 29, 1873, signed by the other locators, and by James T. Maclean, as "executor of the estate of D. H. Crowe, deceased."

By a certified copy of the letters testamentary, issued August 22, 1871, from the Probate Court, City and County of San Francisco, Cal., in the matter of the last will and testament of David Holmes Crowe, deceased, it appears that James T. Maclean and Barry Baldwin were on that date appointed executors of the estate of said Crowe. No copy of said will is attached to said letters.

It also appears by a certificate of the clerk of said court, dated April 8, 1874, that said letters have been revoked, but the certificate fails to show the date of such revocation.

The applicant should file a certified copy of the letters testamentary, with copy of will attached; a certificate of said clerk, showing the date of said revocation, and evidence that *one* of said executors could legally pass title by deed.

When these additional papers have been received the case will be again examined.

Very respectfully,

U. J. BAXTER, *Acting Commissioner.*

No. 27. An applicant for mining patent, who resides in the land district in which the mine is located, if within the district at the time the application is made, must make the affidavits required by section 2325 Revised Statutes. If he is not so within the district, the affidavits may be made by a duly appointed agent, conversant with the facts.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, March 2, 1880.

SIR: I am in receipt of your letter of the eighth of January, 1880, submitting the papers in the matter of mineral entry No. 457, Helena District, Montana Territory, on appeal by Wm. Bell Frue and Nathan S. Vestel, from your decision of October 14, 1879, holding said entry for cancellation.

The entry is of the Topsey lode, designated as lot No. 44 A, and an appurtenant mill site, designated as lot 44 B.

After an examination of the papers, your office, under date of September 10, 1879, addressed a letter to the Register and Receiver, pointing out the following defects in the proceedings:

1. That the title to the mill site appeared to be in Frue alone, and not in the applicants jointly.

2. That the application showing compliance with the statutory requirements, was sworn to by the attorney in fact of the respective applicants, and was not "under oath" of the applicants themselves.

3. That the final affidavit as to posting of notice upon the claim was made by Frue's attorney-in-fact, and not by one of the claimants in person.

You directed the local officers to call upon the claimants to supply the proof required in the manner prescribed by law.

In response thereto, the applicants filed proof of joint ownership of the mill site.

For the other proofs required, they submitted the affidavit of Vestel, one of the applicants, in which he set forth in effect, that, upon information and belief, the notice and plat were posted as the law required, and remained so posted continuously during the entire period of sixty days

of publication of notice in the newspaper; that the information upon which he relied was derived mainly from the affidavits of Walter McDermott, who made the former proof as attorney-in-fact of Frue, and Jerry Strange, which affidavits set forth specifically the facts as to the posting of notice and plat on the claim, and of their remaining so posted continuously from July 18 to October 1, 1878; that that at the time of posting of said notice, both applicants were in the Eastern States, and that therefore it was impossible for either of them to testify from personal knowledge.

As to the sworn statement in the application, nothing farther was offered.

After the filing of these proofs, your office, October 14, 1879, held the entry for cancellation on the ground (1) that the affidavit of Vestel having been made mainly upon information and belief, was not in compliance with law, holding that the statute required this proof to be made from the applicant's personal knowledge; and (2) because the defect in the verification of the application was not cured.

From this decision the appeal was taken.

It further appears from certain papers in the case, that Frue was a resident of Michigan, and Vestel of Lewis and Clarke county, M. T., during the pendency of the application before the local officers, and that Frue was then in Detroit, and Vestel in New York.

Since the appeal, Congress has passed an act, approved January 22, 1880, amending section 2325 of the Revised Statutes by adding the following words: "That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent, may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, that this section shall apply to all applications now pending for patents to mineral lands."

If the defects in the proceedings for patent which form the basis of your decision are cured by said act, it will be unnecessary to consider and pass upon the appellant's exceptions.

In your letter of the eighth ultimo, you state as follows: "The bill to amend said section so that non-residents of the land district embracing the claim may apply by agent, does not appear to cover this case, as the residence of one of the owners is within the Helena, Montana, land district."

Act of January 22, 1880, *liberally construed.*

I think said act should receive a liberal construction. So far as it relates to pending applications it is clearly a remedial act, and so far as it relates to future applications it is an enlarging or beneficial act, and of the kind classed by all law writers as a subdivision of remedial statutes. It is universally held that such a statute is to be liberally construed, and that everything is to be done in advancement of the remedy that may be, consistently with any construction that may be put upon it (Potter's Dwarris, 73-4; Sedgwick, 360-1). But if the portion of the act under consideration should be construed to limit the remedy or benefit to a non-resident, then in this case the act affords no relief, notwithstanding one of the parties is a non-resident. But it must be construed largely and beneficially, so as to suppress the mischief and advance the remedy (Potter's Dwarris, 362; Sedgwick, 359); and this brings us to a consideration of the mischief of the old law that was intended to be remedied by the amendment.

All affidavits under the mining act were required to be made within the land district within which the claim lay, and certain of these affidavits were required to be made by the applicant in person. An owner of a mine residing out of the district, or one who was a resident of the district, but temporarily absent from it, desiring to make application for a patent to a mining claim was compelled to go or return to the district, in order to comply strictly with this requirement, it having been held that such affidavits could not be made by the owner's duly authorized agent, and where the affidavits had been made by agent, as in this case, and an entry allowed by the local officers, the entry would be canceled.

Unless the language of the act will bear no other construction, it can not be held that Congress intended to provide a partial remedy for the defects of the old law, or to

discriminate against resident mine owners; and the remedy is certainly not complete unless the new law will permit a mine owner, if non-resident or not within the district, to have the affidavits which the law required him to make in person made by his authorized agent, and unless it validates pending applications defective only in this, that such affidavits were made by authorized agents in cases in which applicants were unable to make them, by reason of being out of the district.

"It is by no means unusual in construing a remedial statute," says Sedgwick (p. 359), "to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischiefs." It certainly would have been as great a hardship for Vestel, the resident owner, being then in New York, to have returned to Montana to make his affidavits within the district, as for Frue, the non-resident, being then in Detroit.

But I think it is not necessary to extend the enacting words beyond their natural import and effect in order to include the case under consideration; for while, without resorting to the rules of equitable or remedial construction, and by applying the ordinary rules of interpretation, the interpretation which you place upon the act might result, it would still, under the same rules, I think, be susceptible of another interpretation by which the case would be included. The language is: "that where the claimant for a patent is not a resident of or within the land district," etc. Now, it is evident that an intention to limit the benefits of the act to non-residents would have been as clearly expressed as language can make it by omitting the words "or within," so as to read "not a resident of the land district," or by omitting the words "of or," and reading thus: "not a resident within the land district." So to hold that the act is limited to non-residents involves two things that should be avoided in construction, if possible—first, redundancy, and, second, the impossibility of giving full force and effect to every word. Such a construction leaves the words "or within" and "of or" without force or meaning, for the intent to thus limit the operations of the section would be clear without them, but it is certainly doubtful with them.

On the other hand, the intent to extend the benefits of

the act to all applicants not within the district, would have been clearly expressed by leaving out the words, "a resident of or," reading thus: "not within the land district."

The same objections apply to this interpretation as to the other, but with no greater force. Either construction leads to a redundancy, and both are subject to the objection that it is not allowable to take from, or exclude, any words of a statute. What then was in the minds of the law-makers? Evidently, first to provide that claimants who are not residents may be allowed to have the required affidavits made by agents within the districts, "conversant with the facts sought to be established," and to relieve them from the trouble and expense of going to the districts for the purpose of making affidavits about matters, the facts of which are better known to others already there; and second, to allow resident claimants necessarily absent from their districts to make the proofs in the same manner, and thus relieve them also from the expense, trouble, and inconvenience of returning to the district for the purpose of making the affidavits in person. In either case the proofs must be by agents "conversant with the facts."

By this construction the non-resident applicant would not be compelled to make the affidavits in person in any event, while the resident applicant would be compelled to do so if within the district.

This construction seems to avoid redundancy, and gives effect to all the language of the section of the act under consideration. The idea is made reasonably clear by repeating the words "is not" between "or" and "within," thus: "That where the claimant for a patent is not a resident of or *is not* within the land district," etc., and the sense is not destroyed by omitting to repeat these words; indeed, the sentence might have been subject to criticism as tautological if the words had been repeated. And it seems to me that the use of the words which should have been omitted if the intent was to limit the act to non-resident claimants evidences that *both* classes of claimants were intended to be provided for. But even if this were not clearly apparent from the language of the act itself, under ordinary rules of construction, then it must be ad-

mitted that the meaning is doubtful; and the rule is that remedial statutes must be liberally construed, and where the meaning is doubtful they must be construed to extend the remedy. (White v. Steam Tug, etc., 6 Cal. 462; Cullerton v. Mead, 22 Id. 95; Jackson v. Warren, 32 Ill. 331. See also decision of this department, Streeter v. M. K. T. R. R., Copp's L. O. 180, where other cases are cited.)

I am of opinion that the defects on account of which you held the entry for cancellation are cured by the act of January 22, 1880, and that if the entry is otherwise regular and valid it ought to be patented.

C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office.

No. 28. 1. The notice of the hearing should be prepared by the local officers and signed by them.

2. The testimony should be by question and answer, and refer to every ten-acre tract.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 14, 1875.

Register and Receiver, Pueblo, Colorado.

GENTLEMEN: * * * * It is observed that the published notices of hearings to disprove the mineral character of land in your district are signed by the applicants themselves, who appear to make their own arrangements for hearing testimony and publishing notices. This is not the correct practice.

Notice of hearing.

The notice of the hearing should be prepared by the local officers and signed by them, in order to secure a correct description of the land and to insert the names of mineral affiants, should any mineral affidavits covering the land applied for be on file in your office.

You should designate the paper of general circulation near the land in which to publish the notice, and in all cases where practicable, the hearings should be held before you. Where distance or other good cause renders it advisable, you should designate an officer using a seal, or other person authorized to administer oaths, whose character is known to you, residing near the land, as the proper person before whom the hearing shall be held.

The testimony submitted should be as far as possible by questions and answers, and the officer by whom the testimony is taken should endeavor to elicit full information as to the mineral and agricultural qualities of each ten-acre tract of the claim.

Be pleased to acknowledge the receipt hereof.

Very respectfully,

S. S. BURDETT, *Commissioner.*

No. 29. Proceedings where Central Pacific R. R. Co. seek to select land in mineral region.

See circular of September 23, 1880. No. 4.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 27, 1880.

Register and Receiver, Sacramento, California.

GENTLEMEN: I am in receipt of a letter from G. W. Farr, Esq., land attorney for the Central Pacific Railroad Company at Sacramento, asking what proceedings will be required of said company to enable it to establish the character of lands in your district, under the provisions of office circular dated April 27, 1880.

One of the causes which led to the revocation of the order of withdrawal of lands as mineral was, that under existing laws and regulations, every agricultural claimant is required to give notice, by publication and posting, of his intention to offer proof in support of his entry, and it was thought that with this publicity in case of every entry, should any land be claimed which is in fact valuable for minerals, parties interested would come forward and prove the same.

Such proceeding is not required by law in case of selections by the said company, and while it is presumed that all affidavits submitted would be made by credible witnesses, yet I do not think that an opportunity for mistakes should be given, or all protection to persons claiming lands to be mineral withdrawn.

List to be held for thirty days.

When the railroad company shall present a list of lands that they wish to select, accompanied by the usual non-mineral affidavit, you will receive the same and hold it in your office until thirty days notice has been given by pub-

lication in a newspaper of general circulation, published nearest the land, describing the same by legal subdivision, section, township, and range, and setting forth the fact that it has been selected by the company.

Provision for hearings.

During the period of publication, any person may come forward and allege, under oath, that the land is mineral, and at the expiration of such period you will forward to this office a correct list of such tracts as are not so alleged to be mineral in character, and proceed to order a hearing, at the expense of mineral affiants as to other tracts.

Burden of proof.

The burden of proof will be with the parties alleging the land to be mineral, as in homestead and pre-emption entries.

By complying with the foregoing, it is thought that all parties will be protected in whatever rights they may have, and a well-advised conclusion reached by this office.

Whenever the said company shall apply to select certain tracts, you will be governed by the foregoing.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 30. Persons having knowledge that land sought to be entered as agricultural in character is in fact mineral, should appear and testify. In no other way can the land department ascertain the facts or detect fraud. Hearings may be had on due application.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., Nov. 6, 1879.

CHAS. H. WYMAN, Esq., *Auburn, Placer county, California.*

SIR: Your letter of sixteenth August last, and petition therewith from miners in your State, referred by the Hon. Secretary to this office, have been duly considered.

Said petition recites that it has been, and is, the practice of a certain class to claim land as agricultural, and conceal from the land officers its mineral character, obtain title, and then sell and bond the same, to be worked for minerals. It also refers to the Central Pacific Railroad Company as being in the practice of issuing citations for hearings to disprove the *prima facie* mineral character of odd sections

within its grant, and at the hearing abandoning such portions as are claimed by miners as mineral, and after a few months again citing the miners to another hearing concerning the same land. It is asked that when land is once determined or conceded to be mineral, it shall forever be deemed and held as such.

Parties knowing land to be mineral should appear and testify.

In the matter of fraudulent proceedings under agricultural claims, to obtain title to mineral lands, it is obvious that no broad and unqualified rule can arbitrarily be enforced which will be effective under the present laws. Land which is in fact non-mineral is subject to agricultural entry, and if a party seeks under such entry to obtain title to a mineral tract, it is the duty of miners and others who may know its true character to appear at the district land office *and submit proof thereof.* The knowledge of the character of any certain tract is local, and this office must necessarily depend upon parties in the vicinity to prevent fraud in said respect. Published notice of thirty days is uniformly required of parties who seek agricultural entry on lands withdrawn as mineral, and thereby all parties are advised and furnished opportunity to defeat any fraudulent entry.

In regard to the alleged proceedings of said railroad company, you are advised that when a hearing is had to determine the character of certain lands, those alleging them to be valuable for mineral should *submit their proof at the hearing*, and thereafter this office would be in a position to conclude the respective claims of all parties. But if you neglect to submit your proof, and the said company presents none, it is plain that this office can render no final decision, nor can I anticipate any particular excuse which may be urged for the neglect.

In short, if under the present laws those interested in preventing fraudulent entries of mineral lands will avail themselves of the means now furnished them by existing regulations, and appear and *insist* upon the right to submit their testimony at the hearings referred to above, and notify this office forthwith of any refusal to receive their testimony, or irregularity of proceedings, a just conclusion

can be usually reached; but without the co-operation of those interested in an honest disposition of the public lands, it is apparent that this office labors under great embarrassments.

You are assured that it is the desire of this office and department to be advised *by affidavit* of attempted fraud in any case; but it is clearly impracticable to act upon general allegations referring to no particular claim and tract.

Yours, respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

No. 31. Any person who has knowledge of the character of land invited to appear and testify on behalf of the surveyor's return.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON, D. C., April 22, 1875.

Register and Receiver, Boise City, Idaho.

GENTLEMEN: This office has carefully examined the papers and testimony in the matter of the application of William B. Knott to enter under the pre-emption laws the S.E. ¼, N.W. ¼, N.E. ¼, S.W. ¼, S.W. ¼, N.E. ¼, and N.W. ¼, N.W. ¼, Section 1, T. 5 S., R. 4 W., Idaho meridian, which tracts were returned by the surveyor as mineral land.

A hearing was held to determine the character of this land, after due notice before the clerk of the District Court, at Silver City, February 17, 1874.

As the return of the surveyor is *prima facie* correct, the burden of proof is upon the party seeking to disprove such return.* The claimant, Knott, has failed to establish its incorrectness. The testimony in his behalf does not show that the land is more valuable for agricultural than for mining purposes, and his application to enter the same as a pre-emptor is accordingly denied.

You will so notify the parties, allowing sixty days for appeal.

Invitation to disinterested parties to testify.

In this connection I desire to call your attention to circulars of May 6, 1871, March 20, 1872, and June 10, 1872, and the rules of practice approved November 29, 1875, requesting strict compliance therewith, and to state that in

* See circular of April 27, 1880.

contests to determine the character of land, any person who has a knowledge thereof, whether he has an interest therein or not, is permitted to appear and testify in behalf of the surveyor's return. Very respectfully,

S. S. BURDETT, *Commissioner*.

No. 32. 1. Where parties apply for hearing, they should be required to make a deposit to pay preliminary expenses thereof.

2. When hearings are ordered in the regular course of examination of cases, it is the duty of the local officers to collect from parties for expenses already incurred and for future estimated expenses.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., March 23, 1880.

Register and Receiver, Sacramento, California.

GENTLEMEN: September 25, 1879, on the application of James Gasper, you were directed by this office to hold a hearing to determine the character of S. ½ of N.W. ¼ of N.E. ¼, and N. ½ of S.W. ¼ of N.E. ¼, 26, 16 N., 7 E., your district, said land being embraced in Mr. Gasper's Homestead Entry No. 2528, and in Mineral Entry No. 649, by the Portuguese Mining Company.

I am now in receipt of letter of twenty-fourth ultimo from E. C. Ford, attorney for said company, stating that the hearing so ordered was held by you in the early part of December last, and that he is advised that the mineral claimants paid all charges made against them, but that the agricultural affiant, James Gasper, has failed to pay the charges against him, and hence you have not transmitted the record to this office.

On page 5 of the Rules of Practice, it is provided that parties making application for contest must be required to deposit with the Register and Receiver a sufficient sum of money to defray the cost of proceedings. On page 6, it is provided as follows:

"When hearings are ordered by the Commissioner or Secretary, upon discovery of reasons for suspension in the usual course of examination of entries, the preliminary costs will necessarily be provided from the contingent fund for registers and receivers; but when the parties are actually brought before the Register and Receiver in obedience to the order, such costs should be collected, and provision re-

quired for such further notification as may become necessary in the usual progress of the case to final decision."

Deposit to pay preliminary expenses.

The hearing in question was ordered by this office, *not* "in the usual course of examination," but upon application of Mr. Gasper; and it was your duty to require of Mr. Gasper to make the necessary deposit before giving any notice of the hearing.

Hearings ordered in usual course of examination.

If, however, you regarded the case as falling under said provisions applicable to hearings ordered by this office in the usual course of examination, then it was your duty to collect such costs and require provision for such further legitimate expenses as would be necessary in the case, on said parties actually appearing before you, and before commencement of the hearing.

If the representatives of Mr. Ford are correct, you have failed to perform your duty in this matter.

If said allegations are correct, you will at once, upon the receipt of this letter, transmit the record of the hearing to this office, with a full report of all proceedings relative to the point referred to. Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 33. An appeal brings before the appellate authority the entire record, and after an appeal had been dismissed the appellant will not be allowed to go back and appeal from a prior order.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 19, 1873.

SIR: I have examined the appeal of the Overman silver mining company from your decision of the third ultimo, by which you refused to dismiss the appeal taken by the Dardanelles mining company from the decision of the local officers made on the thirteenth of January last. The facts are as follows:

On the twenty-second of October, 1872, the Dardanelles mining company filed in the local office at Carson City, Nevada, an application for patent for 1200 linear feet of the Bosphorus lode, Nevada. On the nineteenth of December, 1872, the Overman silver mining company filed a protest against said application. On the thirteenth of January,

1873, the register notified the superintendent of the Dardanelles company that an adverse claim had been filed against said application, and that said Overman company would be required to commence suit within thirty days from the date of said adverse filing. This was in substance, although lacking in technical precision and formality, a decision that the claim of the Overman company was such an adverse claim as required the case to be referred to the courts.

On the seventeenth of January, 1873, suit was instituted against said Dardanelles company by said Overman, and on the twenty-eighth of February, 1873, the Dardanelles company duly filed its answer in said case. On the fifteenth of March, 1873, the Dardanelles company filed with the register an application to dismiss the adverse claim of the Overman company, and supported said claim with sundry affidavits.

The register set said motion for hearing on the twenty-fifth of March, 1873, and on that day an application was made by the Overman company to continue the hearing of said motion for twenty days, to enable the said company to prepare its proofs and affidavits to resist the motion to dismiss.

The local officers granted the motion to continue for twenty days, and from this order of the local officers the Dardanelles company appealed to the commissioner of the general land office, who, on the eleventh of April, 1873, on motion of the Overman company, dismissed the appeal. On the hearing had before the commissioner, the only objection made to the proceedings theretofore had before the local officers, was the one which related to the order of the local officers of March 25, 1873, continuing the motion to dismiss for twenty days.

No reference whatever was made to the order of the thirteenth of January, 1873, which in substance held that the adverse claim of the Overman company was such an adverse claim as required that it should be referred to the courts.

After the aforesaid appeal was dismissed, and on the twenty-third of April, 1873, the Dardanelles company appealed from the decision of the local officers, made on the thirteenth of January, 1873, in which they held that the claim of the Overman company was an adverse claim. On

the second of June, 1873, the Overman company filed a motion before the Commissioner to dismiss said appeal, and on the third of June the Commissioner overruled said motion, and set down the case for a hearing on its merits.

From this decision of the third of June an appeal has been made to the department, and the question is now presented for decision, whether the Dardanelles company, having once appealed from the decision made by the local officers, on the twenty-fifth of March, 1873, and that appeal been dismissed, can go back of the decision appealed from, and appeal from another made prior to that (on the thirteenth of January, 1873), or whether the appeal from the order of March 25, 1873, brought the whole case before the Commissioner, and gave him jurisdiction thereof, and required that all objections to the proceedings up to that date should be presented to the Commissioner, or if not presented, regarded as waived.

Appeal brings before the appellate authority the entire record.

I am of the opinion that the appeal brought before the Commissioner, the entire proceedings that had taken place prior to the date of the order appealed from, and that all exceptions to any of said proceedings should have been presented and insisted upon before the Commissioner on the hearing of such appeal, and in default thereof should be considered as having been waived. Any other practice is contrary to the analogies derived from legal proceedings, and would be exceedingly inconvenient in practice.

If a party may go back and appeal from a prior order, then he may go back as many different times as there are different orders made, and there practically would be no end to appeals in a given case.

I can not sanction a rule that would result in such consequences.

I shall reverse your decision, and that leaves the parties in court with their respective claims, where it is to be presumed that equal and exact justice will be done.

Your decision is reversed, and the papers transmitted with your letter of the seventh instant are herewith returned. Very respectfully,

B. R. COWEN, *Acting Secretary.*

Hon. W. DRUMMOND, *Commissioner of General Land Office.*

No. 34. 1. A paper addressed to the local officers, notifying them that the claimant appeals from their decision to the Commissioner of the General Land Office, when in fact it was intended as an appeal from the decision of the Commissioner to the Secretary, amounts to nothing, inasmuch as it fails to state in an intelligent manner what decision is appealed from, or to what authority the appeal is taken.

2. The rule established in the "Boston Mining Case," applies to questions under the mining laws. In other cases when the rights of adverse claimants are to be determined, different rules must be applied.

3. When an appeal is defective, reasonable time should be allowed for the perfection, and upon failure of the party to comply with the requirements, the appeal will be dismissed, and the case closed.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., February 16, 1880.

SIR: I have considered the case of George Ogg v. Alexander McDonald, involving the right to enter under the act of August 11, 1876, providing for the sale of the Osage ceded lands, the S. ½ of S. W. ¼, and N. E. ¼ of S. W. ¼, of section 13, town. 29 S., range 17 E., Independence, Kansas, on appeal from your decision of May 4, 1878, awarding the land to McDonald.

Some questions of practice arise in this case, which it is proper to consider at this time.

A hearing was held at the local office November 1, 1877. Under date of January 24, 1878, the local officers transmitted the papers, together with their opinion adverse to Ogg, and the appeal of Ogg therefrom filed December 20, 1877, and the grounds of appeal by counsel for Ogg filed the following day. Your decision in the case was rendered May 4, 1878.

Under date of June 27, 1878, the following paper was filed in the local office:

"In the United States Land Office, Independence, Kansas. George Ogg, plaintiff, v. Alexander McDonald, defendant.

"*To the Register and Receiver United States Land Office, Independence, Kansas.*

"You are hereby notified that George Ogg, plaintiff, above named, appeals from your decision in the above entitled action to the Hon. Commissioner of the General Land Office, assigning as the grounds of said appeal the following, to wit: (The grounds of appeal are here stated.)

GEORGE OGG,
By HUTCHINGS & DENISON, *his Attorneys.*"

It is evident from the former action in the case, and from the date of this communication, that it was intended by Ogg as an appeal from your decision, but owing to the want of information, or the carelessness of Hutchings & Denison, his attorneys, that appeal was not perfected, and the communication above cited, in reality amounts to nothing, inasmuch as it fails to state in an intelligent or definite manner what decision was appealed from, or to what authority the appeal was taken.

It would have been proper for your office, at the expiration of sixty days from the date of your decision, to have transmitted the case with the above communication, *and your report thereon as to its validity as an appeal*, to this department, where instructions would have been given to treat it as an appeal, in view of the intention of Ogg, or to dismiss the same and close the case. Or it would have been competent for you to have notified him that his application was defective, and that he would be allowed a reasonable time to perfect the same.

In my decision of July 14, 1877, in the case of Bell v. Aitken (Copp's Land Owner, vol. 4, p. 66), the rule established by my predecessor in the Boston mining case was approved, but it was upon the theory that under the mining law, there can be no adverse claimant entitled to the right of appeal before this department, hence cases of that character should be transmitted to this department for final supervisory action. But in cases where the rights of adverse claimants are to be determined by the department, different rules must be applied. In such cases, when in your opinion an appeal is defective, you will so notify the party and allow him a reasonable time to perfect the same. Upon his failure to comply with your notice, you will dismiss the appeal and close the case. Should an appeal be taken from your decision on that point, you will transmit all the papers in the case to this department for such final action in the premises as may be deemed proper. Cases submitted in this manner will be docketed and examined as regular appeal cases.

In the case before me, while the communication before cited is not a perfected appeal, yet in view of the evident intention of Ogg to appeal, and his failure to so do is the

result of the action of his attorneys, I think the case should be considered by the appellate authority upon its merits.

The evidence shows that Ogg settled upon the tract, knowing that McDonald, who had paid a valuable consideration for the same, was claiming the land, and that it had been in his possession for a number of years, and that he had improvements thereon of more or less value. He deliberately attempted to appropriate to his own use and possession that which he knew to be the property of another, in equity at least. In view of this fact, he can not be considered, in any sense, a *bona fide* settler entitled to purchase land. I concur with you in the opinion that McDonald is entitled to purchase under the second section of the act of August 11, 1876.

Your decision is therefore affirmed, and the papers in the case are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

To the Commissioner of the General Land Office.

No. 35. Proceedings on imperfect appeal.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, July 9, 1877.

SIR: I am in receipt of your letter of the third instant, transmitting the papers in the case of J. B. McKean v. D. E. Buell, Salt Lake City, Utah Territory.

This case was decided by you on the ninth of April last. On the seventh ultimo, J. B. McKean filed an appeal from your decision, in which he states explicitly the points of your decision from which he appeals, but he failed to state any ground of appeal, or to give any reason for such action. Herein he failed to comply with the Rules of Practice, adopted November 29, 1875; and on the twenty-eighth ultimo you notified the local officers that on account of such non-compliance, your decision had become final.

In the case of Ricketts v. The California and Oregon Railroad Company (Copp's Land Owner for July, 1877), the following instructions were given to your office: "I would suggest that in the examination of appeals, careful scrutiny be given to the same, and if in your opinion it is not properly taken, or, in other words, the document filed

does not constitute an appeal, you will so inform the party, and if it is not perfected, you are authorized, under the instructions of my predecessor, dated March 24, 1876, in the Boston Mining case, to at once transmit the papers to this office for immediate consideration."

It does not appear that McKean has been called upon to perfect his appeal. You will allow him a reasonable time, not to exceed thirty days, in which to take such action.

If the appeal is not perfected, you will dismiss the same and close the case.

The papers transmitted are herewith returned.

Very respectfully,

C. SCHURZ, *Secretary.*

To the Commissioner of the General Land Office.

No. 36. Official letters sent to, and the record of letters sent by the Register and Receiver, are the property of the United States, and should be retained in the office of such Register and Receiver.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 14, 1873.

Register and Receiver, Austin, Nevada.

GENTLEMEN: In the Register's letter of the thirtieth ultimo, he states that, "I do not know the status of this application, as the ex-Register refuses to let me see his letter-book."

All official letters sent to, as well as the official record of letters sent by the Register and Receiver, are the property of the United States, and as such should be retained in the office of such Register and Receiver.

If, therefore, the former Register has taken from the office any letters, documents, or records, which are of the character of official communications or records, you will immediately demand their return to your office.

You are requested to give this matter your immediate attention, and report to this office what action you take.

Very respectfully, your obedient servant,

WILLIS DRUMMOND, *Commissioner.*

No. 37. A case in which the applicant was allowed to furnish the affidavits of two credible persons, having knowledge of the facts, as to posting of notice and diagram, in lieu of the testimony of the persons who posted same.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 4, 1873.

Register and Receiver, Central City, Colorado.

GENTLEMEN: The applicant for patent for the Fingel lode, Griffith mining district, Colorado, informs this office that he is unable to furnish the affidavits of the parties who posted the notice and diagram upon said lode, one being dead, and the other having left the district.

Mr. Brown informs this office that he can furnish the affidavits of responsible and credible persons who are cognizant of the facts, that such notice and diagram were duly posted upon the claim, and that the same remained posted of time required by law.

In view of the circumstances of this case, you will receive the affidavits of at least two credible persons, in proof of such posting, who are cognizant of the facts. This is not to be treated as a precedent in other cases.

Very respectfully, your obedient servant,
WILLIS DRUMMOND, *Commissioner.*

No. 38. Proceedings to obtain patent in case of loss of duplicate receipt.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, April 18, 1870.

Register and Receiver, Central City, Colorado.

GENTLEMEN: I have to acknowledge the receipt of your letter of the seventh instant, in which you state that you have received a letter from G. F. Sadd, Esq., secretary of the Cascade Silver Mining Company, to the effect that duplicate receipt for mineral entry No. 11, Cascade lode, has been lost, and after careful and diligent search can not be found, and desiring to be informed how he can obtain the patent.

In reply, I may state that the patent may be transmitted to Mr. Sadd, upon a compliance with the following conditions, viz.:

1. That he furnish you with satisfactory proof, under

the corporate seal of the company, that he is the duly elected secretary thereof, and authorized to receive the patent for their claim; and

2. His affidavit setting forth that he was in possession of said duplicate receipt, No. 11, for the Cascade lode; that the same has been lost, and that, up to the present time, after careful and diligent search, he is unable to find it.

This affidavit must be taken before an officer duly qualified to administer oaths, and attested by his seal; and upon filing the same, with the evidence before recited, the patent may be sent to him, requesting an acknowledgment of its receipt.

Very respectfully,

JOS. S. WILSON, *Commissioner.*

No. 39. Proceedings to correct patent.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, April 11, 1871.

J. R. HARDENBERGH, Esq., *Surveyor-general, San Francisco, California.*

SIR: Referring to your letter of the twentieth ultimo, returning the patent issued to the Empire Mining Company for their claim on the Ophir Hill ledge or lode, dated March 14, 1870, which, through an error in the plat and field notes, had been described as located in T. 15 N., R. 8 E., Mt. Do. Mer., but which is now shown to be located in T. 16 N., R. 8 E., I have to state that a new patent has been prepared, and will be issued to said Empire Mining Company, for their said claim, as in township *sixteen* (16), north of range eight (8) east, Mt. Do. Mer., upon the claimants thereof making a relinquishment in writing on the back of the patent already issued, of all right, claim, title, or interest to the premises described therein; said relinquishment to be attested under seal, by the clerk of any court within the land district in which the claim is situated.

The patent referred to is herewith returned for that purpose, and you will inform the Empire Mining Company of the contents of this letter, and return said patent to this office, when the proper indorsement has been made thereon.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

No. 40. Proceedings for correction in description of patent by the issue of a new one.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 22, 1875.

Register and Receiver, Sacramento, Cal.

GENTLEMEN: Referring to my letter of the eighth ult., and your reply of the twelfth inst., returning to this office mineral patent No. 531, issued to Osmyn Harkness for his placer claim in T. 15 N., R. 10 E., M. D. M., I have to state that it appears, from a careful examination of the papers in the case, that Mr. Harkness' said placer claim is erroneously described in said patent. It also appears that the said patent has been recorded in the Recorder's office of Placer county, Cal.

I return said patent herewith, and you will inform Mr. Harkness that a new patent will issue to him for his said claim upon the receipt at this office of the inclosure, with a relinquishment indorsed thereon to the United States of the premises therein described, together with a certificate of said recorder that said relinquishment has been duly recorded in the records of his office.

The relinquishment should state that the same is made for the reason that the premises are erroneously described in said patent. The recorder's certificate should also state as to whether or not his records show any conveyances of said premises.

If Mr. Harkness has conveyed said premises to any other person, it will be necessary for him to cause an abstract of such conveyances to be made, certified to by said recorder, and accompanied with a relinquishment from the parties named in said conveyances, and to forward the same with the inclosure (the patent) to this office.

Your early attention to this matter is requested.

Very respectfully,
S. S. BURDETT, *Commissioner.*

No. 41. Lands mineral in character can not be entered with Sioux Half-breed Scrip.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 23, 1875.

Hon. L. V. BOGG, *U. S. Senate.*

SIR: Referring to the letter from Nerce Valle, St. Louis, Mo., referred by you to this office, I have to state that the act of July 17, 1854, authorizing the issuance of Sioux Half-breed Scrip, provides that said scrip may be located upon certain lands within their reservation, "or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government upon which they have respectively made improvements."

Mineral lands are not subject to pre-emption or private entry, but on the contrary are reserved for sale to parties showing compliance with the mining acts of Congress.

Lands which are mineral in character can not, therefore, be entered with Sioux Half-breed Scrip. I return herewith Mr. Valle's letter.

Very respectfully,
L. K. LIPPINCOTT, *Acting Commissioner.*

No. 42. Agricultural College Scrip should not be received in payment for mineral land.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 30, 1873.

Register and Receiver, Fairplay, Colorado Territory.

GENTLEMEN: * * * In this connection I would state, that Agricultural College Scrip can not be used in payment for *mineral land;* and in all cases where you have received the same in payment for *mining claims*, you will call upon the applicants to pay the amount required in cash, and return the *scrip* to the parties from whom you received it.

* * * * * * *

Very respectfully, etc.,
WILLIS DRUMMOND, *Commissioner.*

No. 43. Mineral lands are not subject to location with Porterfield Scrip.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 25, 1876.

Hon. Z. CHANDLER, *Secretary of the Interior.*

SIR: By act of Congress, approved April 11, 1860, 12 Stat. 836, the Secretary of the Interior was authorized to issue to William Kinney and Thomas J. Michie, executors of the last will and testament of Robert Porterfield, deceased, a number of warrants equal to six thousand one hundred and thirty-three acres of land, in quantities not less than forty acres, "to be by them located on any of the public lands which have been or may be surveyed, and which have not been otherwise appropriated at the time of such location, within any of the States or Territories of the United States where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre."

Two forty-acre warrants issued under said act, numbered respectively 93 and 94 were located by Henry Carrigan, and on the second of April, 1873, upon the N. W. ¼ of S. W. ¼, and the S. W. ¼ of S. W. ¼ of Section 20, T. 25 S., R. 6 W., Utah, and on the thirteenth of June, 1873, patents issued to said Carrigan for said tracts.

By the records and files of this office it is shown that on the tenth of August, 1872, J. M. Moore, Ira N. Hinckley, and Thomas Mather made a location under the mining act of the Excelsior Sulphur mine, upon the two forty-acre tracts in question.

This location embraced fifteen hundred feet in length and six hundred feet in width, and was made in accordance with the local laws and Congressional enactments.

By the records of this office it is shown that said mine has been held and worked by said locators and their successors in interest from the date of said location in accordance with the local laws and Congressional enactments. It is also shown that Adolph V. Weise, Adolph A. Leech, and Hugo T. Reitze have received title in said mining claim by purchase from the grantee of the original locators, and they have made application for patent therefor.

By act of Congress approved May 10, 1872, all valuable mineral deposits in lands belonging to the United States,

both surveyed and unsurveyed, were declared free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts.

Mineral lands are, by said act, only subject to disposal to parties who show compliance with the terms of the act, and pay to the proper officer at the rate of five dollars per acre for such lands as contain mineral in rock in place, and two dollars and fifty cents per acre for placer mining ground.

From the foregoing it will be seen that the tracts upon which said Porterfield warrants were located were not of the class of lands which, under said act of April 11, 1860, were subject to location by said warrants, as the same were *mineral lands* and only subject to sale at the rate *of five dollars per acre*, and had been *appropriated* in accordance with law, nearly eight months prior to the date of said warrant locations.

It appears from several communications received at this office from A. V. Weise and his attorneys, that the applicants for patent for said mining claim are the owners by purchase of the premises described in the patents to Carrigan, and they ask that proceedings be commenced in the proper court to set aside the patents issued upon said warrant locations.

In view of the fact that said warrants were fraudulently located upon lands not subject to location under the act of April 11, 1860, and of the fact that patents erroneously issued upon said locations, I have to recommend that the Hon. Attorney-general be requested to cause proceedings to be instituted in the proper court, in the name of the United States, to secure a cancellation of said patents.

A schedule of the papers transmitted herewith is hereto attached.*

I am sir, very respectfully,

Your obedient servant,

J. A. WILLIAMSON, *Commissioner*.

*By direction of the Department of Justice, the U. S. District Attorney for Utah instituted a suit for the purpose of setting aside the patents to Car-

No. 44. Certificates of deposit can not be received in payment for mineral land.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, September 22, 1877.

SIR: I have considered the case of Robert Strowl, coal land applicant, on appeal from your decision of January 26, 1877, refusing to allow him to make part payment for the south-east quarter section 4, township 18 north, range 6 east, Olympia, Washington Territory, with certificate of deposit for the survey of said township.

You held that the certificates of deposit authorized by section 2403 of the Revised Statutes to go in part payment for the lands authorized to be surveyed by section 2401, were receivable for agricultural lands, but not for coal lands, because the last named section says in express terms that *mineral* lands shall not be surveyed.

As coal lands have uniformly been treated by Congress, and by this Department, as mineral lands, I agree with your conclusion that section 2401 does not authorize them to be surveyed, and as a consequence section 2403 does not authorize the certificate of deposit to be received in payment.

Your decision is affirmed, and the papers transmitted with your letter of June 5, 1877, are herewith returned.

Very respectfully,
C. SCHURZ, *Secretary.*

To the Commissioner of the General Land Office.

No. 45. Mineral lands in Indian Territory are not subject to location under the mining laws.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 26, 1873.

R. H. ANGWIN, Esq., *Sherman, Texas.*

SIR: In reply to the inquiry contained in your letter of June 5, 1873, referred to this office by the Secretary of the Interior, I have to state that the minerals in the Indian Territory are not reserved by the United States, and this office has no control whatever over the lands in said territory.

Very respectfully,
WILLIS DRUMMOND, *Commissioner.*

rigan, and on the ninth of November, 1878, said District Attorney reported that on the eighth November, 1878, a decree was taken setting aside said patents and annulling all subsequent deeds.

No. 46. Lands included in Military Reservation are not subject to disposal under the mining laws.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 30, 1879.

S. R. DE LONG, Esq., *Camp Bowie, Arizona.*

SIR: In reply to your letter stating that in company with others you located a gold ledge in July, 1877, that the military reservation at Camp Bowie has since been enlarged so as to include the same, and asking what steps are necessary for you to take to keep your claim alive, you are advised that while the land is within a government reservation you can do nothing to sustain it. Should the reservation be removed and the land restored to public occupation, you should relocate your claim.

Very respectfully,
J. M. ARMSTRONG, *Acting Commissioner.*

No. 47. Repayment of purchase money.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, September 14, 1870.

Register and Receiver, Fairplay, Colorado Territory.

GENTLEMEN: I have received your letter of the twentieth ultimo, inclosing one from Jas. Marshall Paul, Esq., attorney for the South Park Gold Mining and Exploring Company, in which it is stated as follows: "Having become convinced that patents for the Honeycomb and De Mary lodes, Mosquito district, Park county, Colorado, are not desirable at present, we respectfully desire that the papers in the afore-mentioned cases be returned to us, and the same withdrawn, and the purchase money paid remitted to us."

In response to this, you are requested to inform these applicants that unless they decide to proceed in the cases referred to on the basis of our letter to you of seventeenth of June last, their claims will remain suspended, so far as action in this office is concerned, unless an adverse interest should be asserted. And with regard to repayment of the purchase money, you will inform them that there is no provision of law, or regulation of this office, by which the money paid for a mining claim may be refunded when a de-

cision is made reducing the extent of a claim, except for so much of the superficies *as is not included in the resurvey* necessary to cause the claim to conform to the local laws and customs of the miners.

When a decision is rendered by which a claim erroneously entered is reduced in size, the purchase money will be returned to the extent necessary to make the payment meet the requirement of the law, to wit, five dollars per acre or fractional part of an acre, for the area actually embraced by the survey made, in accordance with such decision. Very respectfully,

Your obedient servant,

JOS. S. WILSON, *Commissioner.*

No. 48. The law does not authorize the government to lease the public lands for mining purposes.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, December 8, 1870.

E. J. MAPES, Esq., *Marquette, Mich.*

SIR: In response to the subject of your inquiry in letter of the twenty-ninth ultimo, I have to state that there is no authority of law under which public lands may be leased by the government for mining purposes. * * *

Very respectfully, etc.,

JOS. S. WILSON, *Commissioner.*

No. 49. The land department has no authority to pass upon the question of taxation of mining property by State authority.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, December 11, 1868.

GEO. W. PROBASCO, Esq., *Shingle Springs, California.*

SIR: In reply to your letter of October 16, 1868, requesting the opinion of the Commissioner as to the legality of assessing and taxing mining claims, by the State authorities, while the title still remains in the United States, I have to reply that the question submitted is one in reference to which this office has no duties to perform, and consequently has no authority to pass upon it in any shape.

Very respectfully,

JOS. S. WILSON, *Commissioner.*

* See Forbes v. Gracey, 4 Otto, 762.

No. 50. Definition of "rock in place."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 20, 1871.

HON. THOMAS BOLES, *Dardenelles, Arkansas.*

SIR: In reply to your inquiry of the eleventh instant I have to state that the term "rock in place," as used in the mining acts of Congress, has always received the most liberal construction that the language will admit of, and every class of claims that, either according to scientific accuracy or popular usage, can be classed and applied for as a "vein or lode," may be patented under this law.

The plain object of the law is to dispose of the mineral lands of the United States for money value; and it is a matter of indifference to the Government whether the metal occurs in the form of a true or false vein.*

It may be observed as an important point that no proof is required to establish the vein formation of the deposit. The law requires the Surveyor-general to certify "to the character of the vein exposed;" but this is understood to mean that the certificate should show whether the vein exposed contains gold, silver, cinnabar, or copper.

Very respectfully,
WILLIS DRUMMOND, *Commissioner.*

* "The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineral matter, or more accurately as aggregations of mineral matter, containing ores in fissures." (Van Cotta on Ore Deposits, Primes' Trans. 26.) The term lode or lead is of the same root as the verb "to lead" and as the word "lode" or guiding-star, being whatever the miner could follow and find ore. To the practical miner the fissure and walls are only of importance as boundaries within which he expects to find the ore. "A continuous body of mineralized rock lying within any other well-defined boundaries" would to the miner "equally constitute, in his eyes, a lode." (Eureka Cons. M. Co. v. Richmond M. Co., Field, Sawyer, and Hillyer, JJ., Ninth Cir. Ct.; 4 Saw. 311.) "Placers are superficial deposits which occupy the beds of ancient rivers or valleys." (Moxon v. Wilkinson, 2 Mont. 421.) The distinction between veins and placers stated. (Id.) A vein does not include a placer deposit. (Id.) "Vein or lode," applicable to any zone or belt of mineralized rock lying within boundaries separating it from the adjoining rock. (Eureka v. Richmond, 4 Saw. 302.) A broad metalliferous zone having within its limits true fissure veins plainly bounded can not be regarded as a single vein or lode, although such zone itself may have boundaries which can be traced. Distinguished from Eureka Mining Co. v. Collison, 5 Id. 439.

No. 51. Copper and cinnabar should be entered as "rock in place."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 26, 1871.

J. E. MORGAN, Esq., *Clayton, Cal.*

SIR: * * * As copper and cinnabar are found in "rock in place," rather than in the form of placers, it is held by this office that parties desiring to obtain patents for lands valuable on account of the deposits of cinnabar or copper, must enter the same under the act of July 26, 1866.

Very respectfully, your obedient servant,

WILLIS DRUMMOND, *Commissioner.*

CHAPTER XIV.

CIRCULAR INSTRUCTIONS.

No. 1. General circular of April 1, 1879, relating to lode, placer, tunnel, and mill-site locations.
No. 2. Coal land circular of April 15, 1880.
No. 3. Circular of April 27, 1880, in regard to mineral withdrawals.
No. 4. Notice by publication to be given before entry of land returned by the Surveyor-general as mineral. Circular of September 23, 1880.
No. 5. November 20, 1873, to Surveyors-general.
No. 6. September 13, 1878, to Surveyor-general.
No. 7. January 20, 1879, to local officers.
No. 8. September 24, 1879, to Surveyors-general, prohibiting United States deputy mineral surveyors from acting as attorneys.
No. 9. In relation to publication of notices. Maximum charge.

No. 1.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, April 1, 1879.

GENTLEMEN: Your attention is invited to the Revised Statutes of the United States and the amendments thereto in regard to "Mining Laws and Mining Resources," title xxxii., chapter 6.

* * * * * * * * * * *

MINERAL LANDS OPEN TO EXPLORATION, OCCUPATION, AND PURCHASE.

1. It will be perceived that by the foregoing provisions of law the mineral lands in the public domain, surveyed or unsurveyed, are open to exploration, occupation, and purchase by all citizens of the United States and all those who have declared their intention to become such.

STATUS OF LODE CLAIMS LOCATED PRIOR TO MAY 10, 1872.

2. By an examination of the several sections of the Revised Statutes it will be seen that the *status* of lode claims located *previous* to the tenth May, 1872, is not changed with regard to their *extent along the lode or width of surface.*

2. Mining rights acquired under such previous locations are, however, enlarged by said Revised Statutes in the following respect, viz.: The locators of all such previously taken veins or lodes, their heirs and assigns, so long as they

comply with the laws of Congress and with State, Territorial, or local regulations not in conflict therewith, governing mining claims, are invested with the exclusive possessory right of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such locations at the surface, it being expressly provided, however, that the right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of such outside portion of a vein or ledge to enter upon the surface location of another claimant.

4. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May* 10, 1872, and that where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

5. In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the law requires that *ten dollars* shall be expended annually in labor or improvements on each claim of *one hundred feet* on the course of the vein or lode until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim; a failure to comply with this requirement in any one year subjecting the claim upon which such failure occurred to relocation by other parties, the same as if no previous location thereof had ever been made, unless the claimants under the original location shall have resumed work thereon after such failure and

before such relocation. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended *annually* until patent issues. By decision of the honorable Secretary of the Interior, dated March 4, 1879, such annual expenditures are not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

6. Upon the failure of any one of several co-owners of a vein, lode, or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the co-owners who have performed the labor, or made the improvements, as required by said Revised Statutes, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety day; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditure or improvements, his interest in the claim by law passes to his co-owners, who have made the evpenditures or improvements as aforesaid.

PATENTS FOR VEINS OR LODES HERETOFORE ISSUED.

7. Rights under patents for veins or lodes heretofore granted under previous legislation of Congress are enlarged by the Revised Statutes so as to invest the patentee, his heirs or assigns, with title to all veins, lodes, or ledges, throughout their entire depth, the top or apex of which lies within the end and side boundary lines of his claim on the surface, as patented, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the claim at the surface. The right of possession to such outside parts of such veins or ledges to be confined to such portions thereof as lie between vertical planes drawn downward through the end

lines of the claims at the surface, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges, it being expressly provided, however, that all veins, lodes, or ledges, the top or apex of which lies inside such surface locations, *other* than the one named in the patent, which were *adversely claimed on the tenth of May*, 1872, are excluded from such conveyance by patent.

8. Applications for patents for mining claims pending at the date of the act of May 10, 1872, may be prosecuted to final decision in the General Land Office, and where no adverse rights are affected thereby, patents will be issued in pursuance of the provisions of the Revised Statutes.

MANNER OF LOCATING CLAIMS ON VEINS OR LODES AFTER MAY 10, 1872.

9. From and after the tenth of May 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

10. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth of May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local

laws. For example, four hundred feet can not be taken on one side and two hundred feet on the other. If, however, three hundred feet on each side are allowed, and by reason of prior claims but one hundred feet can be taken on one side, the locator will not be restricted to less than three hundred feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

11. By the foregoing it will be perceived that no lode claim located after the tenth of May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken, depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the tenth day of May, 1872, render such lateral limitation necessary.

12. It is provided by the Revised Statutes that the miners of each district may make rules and regulations, not in conflict with the laws of the United States, or of the State or Territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

13. The statutes provide that no lode claim shall be recorded until after the discovery of a vein or lode within the limits of the ground claimed; the object of which provision

is evidently to prevent the incumbering of the district mining records with useless locations before sufficient work has been done thereon to determine whether a vein or lode has really been discovered or not.

14. The claimant should therefore, prior to recording his claim, unless the vein can be traced upon the surface, sink a shaft, or run a tunnel or drift, to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface, and should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, points of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim, and render it susceptible of identification from the description thereof given in the record of locations in the district.

15. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of the surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and, in the latter case, how many feet are claimed upon each side of such discovery point.

16. Within a reasonable time, say twenty days after the location shall have been marked on the ground, or such time as is allowed by the local laws, notice thereof, accurately describing the claim in manner aforesaid, should be

filed for record with the proper recorder of the district, who will thereupon issue the usual certificate of location.

17. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed, or improvements made thereon, within one year from the date of such location, and annually thereafter; in default of which the claim will be subject to relocation by any other party having the necessary qualifications, unless the original locator, his heirs, assigns, or legal representatives have resumed work thereon after such failure and before such relocation.

18. The expenditures required upon mining claims may be made from the surface or in running a tunnel for the development of such claims, the act of February 11, 1875, providing that where a person or company has, or may, run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same.

19. The importance of attending to these details in the matter of location, labor, and expenditure will be the more readily perceived when it is understood that a failure to give the subject proper attention may invalidate the claim.

TUNNEL RIGHTS.

20. Section 2323 provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel, or veins, or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel.

21. The effect of this is simply to give the proprietors of a mining-tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

22. The term "face," as used in said section, is construed and held to mean the first working-face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted, upon which prospecting is prohibited as aforesaid.

23. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location, by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel-right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

24. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location, defining the tunnel-claim, must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be.

This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

25. By a compliance with the foregoing, much needless difficulty will be avoided, and the way for the adjustment of legal rights acquired in virtue of said section 2323 will be made much more easy and certain.

26. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels to the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statute; and a *reasonable diligence* on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

MANNER OF PROCEEDING TO OBTAIN GOVERNMENT TITLE TO VEIN OR LODE CLAIMS.

27. By section 2325, authority is given for granting titles for mines by patent from the government to any person, association, or corporation having the necessary qualifications as to citizenship and holding the right of possession to a claim in compliance with law.

28. The claimant is required in the first place to have a correct survey of his claim made, under authority of the Surveyor-general of the State or Territory in which the claim lies; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field-notes, in each case, will be prepared by the Surveyor-general; one plat and the original field-notes to be retained in the office of the Surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field-notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other prpers in the case, to this office, and one plat to be sent by the Surveyor-general to the register of the proper land district, to be retained on his files for future reference.

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode, the mining district and county, whether the location is of record, and if so, where the record may be found, the number of feet claimed along the vein, and the presumed direction thereof, the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim, the name or names of adjoining claimants on the same or other lodes, or if none adjoin, the names of the nearest claims, etc.

30. After posting the said plat and notice upon the premises, the claimant will file with the proper Register and Receiver a copy of such plat, and the field-notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses, that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

31. Attached to the field-notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compli-

ance by himself (and by his grantors if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to relate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

32. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz.: Where he claims to be a locator, a full, true, and correct copy of such location should be furnished, as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records; where the applicant claims as a locator in company with others, who have since conveyed their interests in the lode to him, a copy of the original record of location should be filed, together with an abstract of title from the proper recorder, under seal or oath, as aforesaid, tracing the co-locator's possessory rights in the claim to such applicant for patent; where the applicant claims only as a purchaser for valuable consideration, a copy of the location record must be filed, under seal or upon oath as aforesaid, with an abstract of title certified as above by the proper recorder, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant.

33. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

34. Upon the receipt of these papers the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of

such application, for the period of sixty days, in a newspaper published nearest to the claim; and will post a copy of such notice in his office for the same period. In all cases sixty days must intervene between the first and the last insertion of the notice in such newspaper. When the notice is published in a *weekly* newspaper, ten consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for the required period.

35. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

37. The claimant, either at the time of filing these papers with the register or at any time during the sixty days' publication, is required to file a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made upon the claim by the applicant or his grantors; that the plat filed by the claimant is correct; that the field-notes of the survey, as filed, furnished such an accurate description of the claim as will, if incorporated into a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

38. It will be the more convenient way to have this certificate indorsed by the surveyor-general, both upon the plat and field-notes of survey filed by the claimant as aforesaid.

39. After the sixty days' period of newspaper publication has expired the claimant will file his affidavit, showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

40. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field-notes of survey aforesaid, at the rate of five dollars for each acre and five

dollars for each fractional part of an acre, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office; after which the whole matter will be forwarded to the Commissioner of the General Land Office, and a patent issued thereon if found regular.

41. In sending up the papers in the case, the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done, and how long continued.

42. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims.

43. The surveyor-general must continue to designate all surveyed mineral claims, as heretofore, by a progressive series of numbers, beginning with lot No. 37 in each township; the claim to be so designated at date of filing the plat, field-notes, etc., in addition to the local designation of the claim; it being required in all cases that the plat and field-notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the *locus* of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a remote distance from such public corner, in which latter case the reference by course and distance to permanent objects in the neighborhood will be a sufficient designation by which to fix the *locus* until the public surveys shall have been closed upon its boundaries.

ADVERSE CLAIMS.

44. Section 2326 provides for adverse claims, fixes the time within which they shall be filed to have legal effect, and prescribes the manner of their adjustment.

45. Said section requires that the adverse claim shall be filed during the period of publication of notice; that it must be on the oath of the adverse claimant; and that it must show the "*nature*," the "*boundaries*," and the "*extent*" of the adverse claim.

46. In order that this section of law may be properly carried into effect, the following is communicated for the information of all concerned:

47. An adverse mining claim must be filed with the register of the same land office with whom the application for patent was filed, or in his absence with the receiver, and within the sixty days' period of newspaper publication of notice.

48. The adverse notice must be duly sworn to by the person or persons making the same before an officer authorized to administer oaths within the land district, or before the register or receiver; it will fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a mere verbal one, he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator, he must file a duly certified copy of the location from the office of the proper recorder.

49. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition, there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party such improvements were made.

50. Upon the foregoing being filed within the sixty days as aforesaid, the register, or in his absence the receiver,

will give notice in writing to *both parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent will be allowed to proceed upon its merits.

51. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

52. The proceedings after rendition of judgment by the court in such case are so clearly defined by the act itself as to render it unnecessary to enlarge thereon in this place.

53. The proceedings to obtain patents for claims usually called placers, including all forms of deposit, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat will be required, and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

54. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be neces-

sary to repeat them here; it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims, placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

55. By section 2330 authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

56. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

57. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains or of parallelograms five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented, in addition to the other *data* required in the notice.

58. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "S. E. ¼ of the S. W. ¼ of N. W. ¼," or, if in the form of a parallelogram, as aforesaid, it may be described as the "W. ½ of the W. ½ of the S. W. ¼ of the N. W. ¼ (or the N. ½ of the S. ½ of the N. E. ¼ of the S. E. ¼) of section ——, township ——, range ——," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proof submitted with applica-

tions for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

59. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement, and the vein or lode must be surveyed and marked upon the plat; the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. It should be remembered that an application which omits to include an application for a known vein or lode therein, must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of claimant and one or more witnesses.

60. When an adverse claim is filed to a placer application, the proceedings are the same as in the case of vein or lode claims, already described.

QUANTITY OF PLACER GROUND SUBJECT TO LOCATION.

61. By section 2330 it is declared that no location of a placer claim made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

62. Section 2331 provides that all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant.

63. The foregoing provisions of law are construed to mean that after the ninth day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872,

no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed one hundred and sixty acres, which location of one hundred and sixty acres can not be made by a less number than eight *bona fide* locators; and no local laws or mining regulations can restrict a placer location to less than twenty years, although the locator is not compelled to take so much.

64. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations, so far as the same are applicable; the law requiring, however, that where placer claims are upon *surveyed* public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

65. With regard to the proofs necessary to establish the possessory right to a placer claim, section 2332 provides that "where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

66. This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

67. When an applicant desires to make his proof of possessory right in accordance with this provision of law, you will not require him to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will require him to furnish a duly certified copy of the statute of limitations of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area

thereof, the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim.

68. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

69. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

70. It will be to the advantage of claimants to make their proofs as full and as complete as practicable.

MILL-SITES.

71. Section 2337 provides that, "where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction works,

not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section."

72. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode, and to a piece of non-mineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337 United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim.

73. In making the survey in a case of this kind, the lode claim should be described in the plat and field notes as "Lot No. 37, A," and the mill site as "Lot No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill site claim.

74. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode, the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

75. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist

of the sworn statement of the claimant, supported by that of one or more disinterested persons capable from acquaintance with the land to testify understandingly.

76. The law expressly limits mill-site locations made from and after its passage to *five acres*.

77. The registers and receivers will preserve an unbroken consecutive series of numbers for all mineral entries.

PROOF OF CITIZENSHIP OF MINING CLAIMANTS.

78. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge, or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

79. In case of an individual or an association of individuals who do not appear by their duly authorized agent, you will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

80. In case an applicant has declared his intention to become a citizen, or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

81. The affidavit of citizenship may be taken before the register and receiver, or any other officer authorized to administer oaths within the district.

APPOINTMENT OF DEPUTY SURVEYORS OF MINING CLAIMS—CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS AND RECEIVERS, ETC.

82. Section 2334 provides for the appointment of surveyors of mineral claims, authorizes the Commissioner of the

General Land Office to establish the rates to be charged for surveys and for newspaper publications, prescribes the fees allowed to the local officers for receiving and acting upon applications for mining patents and for adverse claims thereto, etc.

83. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many *competent* deputies for the survey of mining claims as may seek such appointment; it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States; the system of making *deposits* for mineral surveys, as required by previous instructions, being hereby revoked as regards *field work;* the claimant having the option of employing *any* deputy surveyor within such district to do his work in the field.

84. With regard to the *platting* of the claim and other *office work*, in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer, or designated depository, in favor of the United States treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

85. The surveyors-general will endeavor to appoint mineral deputy surveyors so that one or more may be located in each mining district for the greater convenience of miners.

86. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them.

87. The law requires that each applicant shall file with the Register and Receiver a sworn statement of all charges and fees paid by him for publication of notice and for survey; together with all fees and money paid the Register and Receiver, which sworn statement is required to be transmitted to this office, for the information of the Commissioner.

88. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

89. The fees payable to the Register and Receiver for filing and acting upon applications for mineral land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim.

90. All fees or charges under this law may be paid in United States currency.

91. The Register and Receiver will, at the close of each month, forward to this office an abstract of mining applications filed, and a register of receipts, accompanied with an abstract of mineral lands sold, and an abstract of adverse claims filed.

92. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the Register and Receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

HEARINGS TO ESTABLISH THE CHARACTER OF LANDS.*

93. Section 2335 provides that all affidavits required under this chapter may be verified before *any* officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and when duly certified by the officer taking the same shall have the same force and effect as if taken before the Register and Receiver of the land office.

94. Hearings of this character, as practically distinguished, are of two kinds:

1. Where lands which are sought to be entered and patented as agricultural are alleged by affidavit to be mineral, or when sought as mineral their non-mineral character is alleged.

The proceedings relative to this class are in the nature of a contest between two or more known parties, and the testimony may be taken on personal notice of at least ten days, duly served on all parties, or, if they can not be found, then

* See Nos. 3 and 4.

by publication, for thirty days in a newspaper of general circulation, to be designated by the register of the land office as published nearest to the land in controversy. If publication is made in a weekly newspaper, the notice must be inserted in five consecutive weekly issues thereof.

2. When lands are returned as mineral by the Surveyor-general, or are withdrawn as mineral by direction of this office.

When such lands are sought to be entered as agricultural, notice must be given by publication for thirty days, as aforesaid, and also by posting in a conspicuous place on each forty-acre subdivision of the land claimed, for the same period.

95. All notices must describe the land, give the name and address of the claimant, the character of his claim, and the time, place, and purpose of the hearing.

Proof of service of notice, when personal, must consist of either acknowledgment of service indorsed on the citation (which is always desirable), or the affidavit of the party serving the same, giving date, place, and manner of service, indorsed as aforesaid.

Proof of publication must be the affidavit of the publisher of the newspaper, stating the period of publication, giving dates, stating whether in a daily or weekly issue, and a copy of the notice so published must be attached to, and form a part of, the affidavit.

Proof of posting on the claim must be made by the affidavits of two or more persons who state when and where the notice was posted; that it remained so posted during the prescribed period, giving dates, and a copy of the notice so posted must be attached to, and made a part of, the affidavits.

Proof of notice is indispensable to the regularity of proceedings, and must accompany the record in every case.

The expense of notice must in every case be paid by the parties thereto.

96. At the hearing there must be filed the affidavit of the publisher of the paper that the said notice was published for the required time, stating when and for how long such publication was made, a printed copy thereof to be attached and made a part of the affidavit. In every case where prac-

ticable, in addition to the foregoing, *personal* notice must be served upon the mineral affiants, and upon any parties who may be mining upon or claiming the land.

97. At the hearing, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has never been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

98. The testimony should also show the agricultural capacities of the land, what kinds of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops or cereals or vegetables, and within which particular ten-acre subdivisions such crops are raised; also which of these subdivisions embrace his improvements, giving in detail the extent and value of his improvements, such as house, barn, vineyard, orchard, fencing, etc.

99. It is thought that *bona fide* settlers upon lands really agricultural will be able to show, by a clear, logical, and succinct chain of evidence, that their claims are founded upon law and justice; while parties who have made little or no permanent agricultural improvements, and who only seek title for speculative purposes, on account of the mineral deposits known to themselves to be contained in the land, will be defeated in their intentions.

100. The testimony should be as full and complete as possible; and, in addition to the leading points indicated above, everything of importance bearing upon the question

of the character of the land should be elicited at the hearing.

101. Where the testimony is taken before an officer who does not use a seal, other than the register and receiver, the official character of such officer must be attested by a clerk of a court of record, and the testimony transmitted to the register and receiver, who will thereupon examine and forward the same to this office, with their joint opinion as to the character of the land as shown by the testimony.

102. When the case comes before this office, such an award of the land will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land in any forty-acre tract, the necessary instructions will be issued to enable the agricultural claimant, *at his own expense*, to have the work done, at his option, either by the United States deputy, county, or other local surveyor; the survey in such case may be executed in such manner as will segregate the portion of land actually containing the mine, and used as surface ground for the convenient working thereof, from the remainder of the tract, which remainder will be patented to the agriculturist to whom the same may have been awarded, subject, however, to the condition that the land may be entered upon by the proprietor of any vein or lode for which a patent has been issued by the United States for the purpose of extracting and removing the ore from the same, where found to penetrate or intersect the land so patented as agricultural, as stipulated by the mining act.

103. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

104. Upon the filing of the plat and field-notes of such survey, duly sworn to as aforesaid, you will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to this office, to be affixed to the duplicate and triplicate township plats respectively.

105. In cases where a portion of a forty-acre tract is awarded to an agricultural claimant, and he causes the segregation thereof from the mineral portion, as aforesaid, such agricultural portion will not be given a numerical designation as in the case of surveyed mineral claims, but will simply be described as the "Fractional ——— quarter of the ——— quarter of section ———, in township ———, of range ———, meridian, containing ——— acres, the same being exclusive of the land adjudged to be mineral in said forty-acre tract."

106. The surveyor must correctly compute the area of such agricultural portion, which computation will be verified by the surveyor-general.

107. After the authenticated plat and field-notes of the survey have been received from the surveyor-general, this office will issue the necessary order for the entry of the land, and in issuing the receiver's receipt and register's patent certificate you will invariably be governed by the description of the land given in the order from this office.

108. The fees for taking testimony and reducing the same to writing in these cases will have to be defrayed by the parties in interest. Where such testimony is taken before any other officer than the register and receiver, the register and receiver will be entitled to no fees.

109. If, upon a review of the testimony at this office, a ten-acre tract should be found to be properly mineral in character, that fact will be no bar to the execution of the settler's legal right to the remaining *non-mineral* portion of his claim, if contiguous.

110. No fear need be entertained that miners will be permitted to make entries of tracts ostensibly as mining claims, which are not mineral, simply for the purpose of obtaining possession and defrauding settlers out of their valuable agricultural improvements; it being almost an impossibility for such a fraud to be consummated under the laws and regulations applicable to obtaining patents for mining claims.

111. The fact that a certain tract of land is decided upon testimony to be mineral in character, is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days' publication of notice, and

posting of diagrams and notices, as a preliminary step, and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less than five hundred dollars thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost where a survey is required, after which he can enter and pay for the land embraced by his claim.

J. A. WILLIAMSON, *Commissioner.*

No. 2. Circular instructions to local land officers, under the law providing for the sale of coal lands.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 15, 1880.

GENTLEMEN: The act of Congress, approved March 3, 1873, entitled "An Act to provide for the sale of the lands of the United States containing coal," is as follows, to wit: [Sections 2347, 2348, 2349, 2350, 2351, and 2352, Revised Statutes. See pages 14–16.]

Your attention is called to the following points:

1. The sale of coal lands is provided for: 1. By ordinary private entry under section 1. 2. By granting a preference right of purchase based on priority of possession and improvement under section 2.

2. The land entered under either section must be *by legal subdivisions*, as made by the regular United States survey. Entry is confined to surveyed lands; to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

3. Individuals and associations may purchase. If an individual, he must be twenty-one years of age and a citizen of the United States, or have declared his intention to become such citizen.

4. If an association of persons, each must be qualified as above.

5. A person is not disqualified by the ownership of any

quantity of other land, nor by having removed from his own land in the same State or Territory.

6. Any individual may enter by legal subdivisions as aforesaid any area not exceeding one hundred and sixty acres.

7. Any association may enter not to exceed three hundred and twenty acres.

8. Any association of not less than four persons, duly qualified, who shall have expended not less than $5,000 in working and improving any coal mine or mines, may enter under section 2 not exceeding six hundred and forty acres, including such mining improvements.

9. The price per acre is $10 where the land is situated *more* than fifteen miles from any completed railroad, and $20 per acre where the land is *within* fifteen miles of such road.

10. Where the land lies *partly within* fifteen miles of such road and in *part outside* such limit, the *maximum* price must be paid for all legal subdivisions the greater part of which lies within fifteen miles of such road.

11. The term "completed railroad" is held to mean one which is actually constructed on the face of the earth; and lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at $20 per acre.

12. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines, and which they shall have in actual possession.

13. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly-defined possession must be established.

14. The *opening and improving* of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

15. These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry,

shows an intention to continue his development of the mines in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under section 2 by adverse claimants, as the circumstances of each case may justify.

16. In conflicting claims, where improvement has been made *prior to March* 3, 1873, you will, if each party make subsequent compliance with the law, award the land *by legal subdivisions*, so as to secure to each as far as possible his valuable improvements; there being no provision in the act allowing a joint entry by parties claiming separate portions of the same legal subdivision.

17. In conflicts, when improvements, etc., have been commenced subsequent to March 3, 1873, or shall be hereafter commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

18. After an entry has been allowed to one party, you will make no investigation concerning it at the instance of any person except on instructions from this office. You will, however, receive all affidavits concerning such case and forward the same to this office, accompanied by a statement of the facts as shown by your records.

19. Prior to entry, it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest and substantiated by the affidavits of disinterested and credible witnesses.

20. Notice of contest, in every case where the same is practicable, must be made by reading it to the party to be cited and by leaving a copy with him. This notice must proceed from your office and be signed by the Register or Receiver. Where such personal service can not be made by reason of the absence of the party, and because his whereabouts are unknown, a copy may be left at his residence, or, if this is unknown, by posting a copy in a conspicuous place on the tract in controversy, and by publication in a weekly newspaper having the largest general

circulation in the vicinity of the land (where no newspaper shall be specified by this office) for five consecutive insertions, covering a period of four weeks next prior to the trial; and in each case requiring such notice a copy must be forwarded with the returns to this office, accompanied with proof of service by affidavit indorsed thereon.

21. In every case of contest all papers in the same must be forwarded to this office for review before an entry is allowed to either party.

22. Thirty days from your decision will be allowed by you to enable any party to take an appeal, or file argument to be forwarded to this office.

23. No appeal will be entertained unless the same shall be forwarded through the district land office.

24. The party may still further appeal from the decision of the Commissioner of the General Land Office to the Secretary of the Interior. The appeal must be taken within sixty days after service of notice on the party. This may be filed with the district land officers and by them forwarded, or it may be filed with the Commissioner, and must recite the points of exception.

25. If not appealed, the decision is by law made final. (See section 10, act of June 12, 1858, United States Statutes, volume 11, page 326.) After appeal, thirty days are usually allowed for filing arguments, and the case is then sent to the Secretary, whose decision is final and conclusive.

26. Manner of obtaining title: First by private entry. The party will present the following application to the Register, and will make oath to the same:

"I, —— ——, hereby apply, under the provisions of the act approved March 3, 1873, entitled "An Act to provide for the sale of the lands of the United States containing coal," to purchase the —— quarter of section ——, in township —— of range ——, in the district of lands subject to sale at the land office at ——, and containing —— acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have declared my intention to become a citizen of the United States) and have never held nor purchased lands under said act, either as an individual or as a member of an asso-

ciation; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. So help me God.

"—— ——."

To this affidavit the Register will append the usual jurat.

27. Thereupon the Register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant must then pay the amount of purchase money.

28. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the Commissioner at Washington or by the register at the district land office.

29. This disposition at private entry will be subject to any valid prior adverse right which may have attached to the same land, and which is protected by section 2.

30. Second. When the application to purchase is based on a priority of possession, etc., as provided for in section 2, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, etc., must be allowed.

31. The declaratory statement must be substantially as follows, to wit:

"I, —— ——, being —— years of age, and a citizen of the United States (or having declared my intention to become a citizen of the United States), and never having, either as an individual or as a member of an association, held or purchased any coal lands under the act approved March 3, 1873, entitled "An Act to provide for the sale of

the land of the United States containing coal," do hereby declare my intention to purchase, under the provisions of said act, the —— quarter of section ——, in township —— of range ——, of lands subject to sale at the district land office at ——, and that I came into possession of said tract on the —— day of ——, A. D. 18—, and have ever since remained in actual possession continuously, and have expended in labor and improvements on said mine the sum of —— dollars, the labor and improvements being as follows: (here describe the nature and character of the improvements;) and I do furthermore solemnly swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. —— ——."

32. When the township plat is not on file at date of claimant's first possession, the declaratory statement must be filed within sixty days from the filing of such plat in your office.

33. When improvements shall have been made prior to June 4, 1873, the declaratory statement must be filed within sixty days from that date.

34. No sale under this act will be allowed prior to September 4, 1873. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment, but you will allow no party to make final proof and payment, except on notice as aforesaid to all others who appear on your records as claimants to the same tracts.

35. A party who otherwise complies with the law may enter *after* the expiration of said year, *provided* no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the government can not thereafter protect him against another who complies

with the law, and the value of his improvements can have no weight in his favor.

36. One person can have the benefit of one entry or filing *only*. He is disqualified by having made such entry or filing alone, or as a member of an association. No entry can be allowed an association which has in it a single person thus disqualified, as the law prohibits the entry or holding of more than one claim either by an individual or an association. You are to allow no entry, under this act, of lands containing other valuable minerals. You will determine the character of the land under the present rules relative to agricultural and mineral lands. Those that are sufficiently valuable for other minerals to prevent their entry as agricultural lands can not be entered under this act.

37. Assignments of the right to purchase under this act will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which dates from the first day of the possession of the assignor who initiated the claim.

38. You will so construe this act in its application as not to destroy or impair any rights which may have attached prior to March 3, 1873. Those persons who may have initiated a valid claim under any prior law relative to coal lands will be permitted to complete their entries under the same.

39. You will report at the close of each month as "sales of coal lands" all filings and entries under this act in separate abstracts, commencing with number *one*, and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands you will continue the same without change. The affidavit required from each claimant at the time of actual purchase will be as follows, to wit:

"I, —— ——, claiming the right of purchase under the act of Congress entitled "An act to provide for the sale of the lands of the United States containing coal," approved March 3, 1873, to the —— quarter of section ——, in township —— of range ——, subject to sale at ——, do solemnly swear that I have never had the right of purchase under this act, either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in de-

veloping coal mines on said tract, in labor and improvements, the sum of —— dollars, the nature of such improvements being as follows: —— —— ——; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowlege, any valuable mineral deposit other than gold. So help me God.

"—— ——."

"I, —— ——, of the land office at ——, do hereby certify that the above affidavit was sworn and subscribed to before me this —— day of ——, A. D. 18—.

"—— ——."

40. In case the purchaser shows by an affidavit that he is not personally acquainted with the character of the land, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent, it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

J. A. WILLIAMSON, *Commissioner.*

To Registers and Receivers.

No. 3.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., April 27, 1880.

Registers and Receivers, United States District Land Offices.

GENTLEMEN: Your attention is directed to the following copy of letter from the Hon. Secretary of the Interior:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, April 22, 1880.

"SIR: I have received your letter of the sixteenth instant, calling my attention to the withdrawals heretofore made of

mineral lands under the direction of my predecessor, Hon. C. Delano, and setting forth at length the difficulties which arise in the adjustment of homestead and pre-emption claims on account of said withdrawals, and recommending, in view of such difficulties, that the 'present policy and practice of throwing the burden of proof upon agricultural claimants be reversed; that the applicant for such entry be required to make the non-mineral affidavit required as aforesaid, and that this be deemed sufficient, in absence of the alleged mineral character of his claim; that if a party does allege in proper form that the land is valuable for minerals, he should be required to affirmatively prove the fact, instead of in every case, with or without such allegation, requiring every settler to prove an expensive negative.'

"You further recommend 'that the withdrawals heretofore made as aforesaid be revoked, in order to remove the restriction upon *bona fide* agricultural settlements, and to place such lands in a condition where they can be occupied, purchased, and developed.'

"I have carefully considered the recommendations made by you for the reasons stated, and have to say that they meet my approval.

"You are therefore instructed to so modify the instructions of your office as to conform to said recommendations, and you are also instructed to revoke the orders of withdrawals mentioned by you, in order that the restrictions thereby made upon agricultural settlements of the lands may be removed.

"Very respectfully,

"C. SCHURZ, *Secretary.*

"*To the Commissioner of the General Land Office.*"

The recommendations to the Honorable Secretary, upon which his said approval was based, are in brief and in substance, that immense tracts of land are now, and for several years last past have been officially designated as mineral lands; that as a matter of fact, but an exceedingly small part of this entire area is valuable for minerals, but is good agricultural land; that these withdrawn lands are subject to entry under the homestead, pre-emption, and other laws providing for the sale of agricultural lands, only after a

hearing, in every case wherein the burden of proof lies upon the agricultural applicant to establish that the tract claimed is non-mineral; that it is thus rendered exceedingly easy to cause such applicant great expense, delay, and vexation; that the expense, embarrassment, and delay actually incident to the course hitherto pursued, operate to discourage and prevent settlements on such lands; that the timber on these lands is being largely taken on the claim that they are mineral lands, and that the vast tracts so designated, and which are capable of supporting many thousands of settlers, adding largely to the productions of the country, and contributing to its better progress, are not only for the most part practically reserved from sale under any law, but being so secluded, it becomes easier for a party to fraudulently enter as agricultural a tract which he may discover to be valuable for minerals, than for a *bona fide* settler to secure patent for agricultural land. All of such withdrawals heretofore made of lands in your district are hereby revoked; and when any party applies to enter any tract under any of the laws relating to agricultural lands, he will be required to make the usual non-mineral affidavit, which, in the absence of any allegation that the land is mineral, will be deemed sufficient. Should affidavits be filed with you properly alleging any tract sought to be entered as aforesaid to be mineral, you will, after due notice, hold a hearing to determine the facts. In such cases the burden of proof will rest upon the party who alleges the land to be valuable for minerals, and he must affirmatively prove his allegations.

It is expected that you will exercise all possible prudence and care in respect to this matter, and endeavor to carefully and conscientiously maintain and advance the purpose of the department and this office, to wit, to enable the public lands which are in fact agricultural to be occupied and purchased without oppressive conditions, and to prevent lands which are in fact valuable for minerals from being taken, except under the special laws applicable thereto.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 4. Circular.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 23, 1880.

Registers and Receivers, United States District Land Office.

GENTLEMEN: Hereafter, in case of application being made in your office to enter or select, as agricultural land under any act of Congress other than the pre-emption or homestead acts, lands returned as mineral by the Surveyor-general, you will require the applicant, at date of final proof, location, or selection, to publish for thirty days a notice describing the land applied for, and giving time and place when such proof will be submitted or selection tendered. You will also post in your office a copy of the notice for the same period. Proof of publication will consist of the affidavit of the publisher of the newspaper in which the notice was published, and you will furnish your own certificate as to posting in your office.

The revocation of the withdrawals of lands as mineral by circular of April 27, 1880, was made not only because said withdrawals had, in many instances, worked great hardships to settlers, but because it is required by law that homestead and pre-emption claimants shall publish notices of their intention to make final proof on their entries, and this was thought to afford sufficient protection to all parties; but in case of entries under other laws there is no such notice required. This procedure will apply to cases of application to enter under the town-site, desert-land, and timber-culture laws; applications to select lands under grants to States, railroad and wagon-road companies; and the locations of the various classes of scrip upon lands which have been returned by the Surveyor-general as mineral in character.

Where, after such publication of notice has been regularly made, no affidavits alleging the mineral character of the land have been filed with you, you will allow the entry, selection, or location upon the filing of a proper non-mineral affidavit. If such mineral affidavits shall have been filed, you will proceed with a hearing, as directed by the circular of April 27, 1880. Acknowledge receipt hereof.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 5.

[N.] DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 20, 1873.

SIR: Information has reached this office that deputies, in surveying mining claims, are in the habit of following the direction of the parties in interest instead of adhering to the lines established in the original location of such claims, and thus in effect making a private instead of an official survey.

Under all laws and regulations, whether local or general, the location of a claim in such a manner as to give notice to all the world of the nature and extent of the same, is not only indispensable, but in most cases mining claims are initiated thereby, and all subsequent proceedings are based upon and must conform to such location.

A failure to make and record the location in accordance with the law and regulations in force at the date of the location will defeat the claim, and if it is not made with such definiteness as to operate as notice to all persons seeking to acquire rights to mining lands, it will be void for uncertainty.

It follows, therefore, that in making surveys of mining claims it becomes essentially necessary to ascertain the boundaries thereof as established by the original location, for the rights of the claimant are limited and defined by such boundaries.

To make a survey in accordance with other lines or boundaries is tantamount to making a new location of the claim, and the rights of adjoining locators who have complied with the requirements of the law may be interfered with, and defeated thereby.

The practice of making surveys according to the dictation of parties in interest, instead of in accordance with the original location, has already caused great confusion, and been productive of great injury to *bona fide* claimants.

You will therefore require the applicant for a survey to furnish a copy of the original record of location, properly certified to by the recorder having charge of the records of mining locations in the district where the claim is situate, and cause all official surveys of mining claims to be made in strict conformity to the lines established by the original location as recorded; and if the records of locations made

prior to the passage of the mining act of May 10, 1872, is not sufficiently definite and certain to enable the deputy to make a correct survey therefrom, he should, after reasonable notice in writing, to be served personally or through the United States mail on the applicant for survey and adjoining claimants whose residence or post-office address he may know or can ascertain by the exercise of reasonable diligence, take the testimony of neighboring claimants and other persons who are familiar with the boundaries thereof as originally located and asserted by the locators of the claim, and after having ascertained by such testimony the boundaries as originally established, he should make a survey in accordance therewith, and transmit full and correct returns of survey, accompanied by the copy of the record of location, the testimony, and a copy of the notice served on the claimant and adjoining proprietors, certifying thereon when, in what manner, and on whom, service was made.

The act of Congress of May 10, 1872, expressly provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," and "that all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim."

These provisions of the law must be strictly complied with in each case to entitle the claimant to a survey and patent, and, therefore, should a claimant, under a location made *subsequent* to the passage of the mining act of May 10, 1872, who has not complied with said requirements in regard to marking the location upon the ground and recording the same, apply for a survey, you will decline to make it.

The only relief for a party under such circumstances will be to make a new location in conformity to law and regulations, as no case will be approved and patented by this office unless these and all other provisions of law are substantially complied with.

If the law has been complied with in the matter of marking the location on the ground and recording the same, and any question arises in the execution of the survey as to the identity of monuments, marks, or boundaries which can not be determined by a reference to the record, the deputy

should take testimony in the manner hereinbefore prescribed for surveys of claims located *prior* to May 10, 1872, and having thus ascertained the true and correct boundaries originally established, marked, and recorded, make the survey accordingly.

You will at once issue instructions to your deputies, requiring them to abandon the practice of surveying mining claims under the direction of parties in interest, and to conform to the rule as hereinbefore prescribed.

From an examination of the returns of surveys of mining claims I am satisfied that in many instances the deputy surveyors certify to the value of improvements without ascertaining whether such improvements are made by the claimant or his grantors, or not.

No improvements should be included in the estimate unless they have been made by the applicant for survey or by those from whom he derives title.

The value of improvements made upon other locations, or by other claimants, should not be taken into consideration, but excluded by deputies in their estimate of improvements upon the claim.

You will so instruct your deputies, and hereafter require them to certify in each instance that the improvements and expenditures considered by them in their estimate, and which they must describe in their report, were made by the applicant, or by the persons from whom he derives title.

The following certificate will be attached to the field notes of survey by the Surveyor-general:

"I certify that the foregoing transcript of the field notes of the survey of the —— mining claim, situate in —— mining district, county of ——, and —— of ——, has been correctly copied from the original notes of said survey on file in this office; that said field notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises; and that such reference is made therein to natural objects and permanent monuments as will perpetuate and fix the *locus* thereof.

"I further certify that the value of the labor and improvements upon the said mining claim, placed thereon by

the claimant and his grantors, is not less than five hundred dollars, and that said improvement consists of (here describe the improvements made by the applicant and his grantors upon the claim). I further certify that the plat thereof, filed in the United States land office at ——, is correct and in conformity with the foregoing field notes.

"——— ———,

"*U. S. Surveyor-general for* ——.

"*U. S. Surveyor-general's Office,*

"———, ——— ——, 18—."

The following certificate will be indorsed upon each plat by the Surveyor-general, viz.:

"The original field notes of the survey of the ——, from which this plat has been made, have been examined and approved, and are on file in this office, and I hereby certify that they furnish such an accurate description of said —— mining claim as will, if incorporated into a patent, serve fully to identify the premises; and that such reference is made therein to natural objects and permanent monuments as will perpetuate and fix the *locus* thereof.

"I further certify that the value of the labor and improvements upon the said mining claim, placed thereon by the applicant and his grantors, is not less than five hundred dollars, and that said improvements consist of (here describe the improvements made by the applicant or his grantors upon the claim). And I further certify that this is a correct plat of said —— mining claim or premises, made in conformity with said original field notes of survey thereof.

"——— ———,

"*U. S. Surveyor-general for* ——.

"*U. S. Surveyor-general's Office,*

"———, ——— ——, 18—."

You will acknowledge the receipt hereof, and issue the necessary instructions to your deputies, to secure a strict compliance with the foregoing instructions.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

U. S. Surveyor-general,

———.

No. 6. Circular.

N. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September, 13, 1878.

To U. S. Surveyors-general.

By direction of the Hon. Secretary for the Interior, under date of the sixth instant, you are hereby instructed as follows:

Survey for patent must be made subsequent to recording of location of mine.

1. The survey and plat of mineral claims, required by section 2325 Revised Statutes of the United States, to be filed in the proper land office with application for patent, must be made subsequent to the recording of the location of the mine; and when the original location is made by survey of a United States Deputy Surveyor, such location survey can not be substituted for that required by the statute as above indicated.

Deputy to report value etc. of improvements.

2. The Surveyor-general should derive his information upon which to base his certificate as to the value of labor expended or improvements made, from his deputy who makes the actual survey and examination upon the premises) and such deputy should specify with particularity and full detail the character and extent of such improvements.

I desire also to call your attention to section 2320, U. S. Revised States, referring to vein or lode claims, which requires that "the end lines of each claim shall be parallel to each other."

It appears that in some instances this explicit statutory requirement has been disregarded. Hereafter you will approve no survey of such claims unless the end lines thereof are parallel to each other.

Promptly instruct your deputy surveyors accordingly.

Very respectfully,

U. J. BAXTER, *Acting Commissioner.*

No. 7.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., January 20, 1879.

Registers and Receivers, U. S. Land Offices.

Hereafter, when a mineral entry is made in your office, you will promptly report the fact, with proper description, to the Surveyor-general of your district.

You will likewise report cancellations of mineral entries.

Very respectfully,
J. A. WILLIAMSON, *Commissioner.*

No. 8.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., September 24, 1879.

To United States Surveyors-general.

GENTLEMEN: You will please instruct all United States deputy mineral surveyors in your respective districts that they are precluded from acting, either directly or indirectly, as attorneys in mineral claims.

You will also forthwith transmit to this office a list of all your deputy mineral surveyors, with the post-office address of each. Advise this office of subsequent appointments as soon as made, and promptly report any violation of this order. Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

Approved. A. BELL, *Acting Secretary.*

No. 9. Circular in relation to newspaper publication of notice of application for patent.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., November 22, 1880.

Registers and Receivers, United States District Land Offices.

GENTLEMEN: It has been represented to me by the publishers of newspapers and numerous other persons interested, that the rate of compensation prescribed by me and promulgated in official circular of April 19, 1880, for the publication of notices of intention to apply for patent to mining claims, is inequitable, and in many instances inadequate.

Since the promulgation of the former circular, additional facts have been brought to my attention, and I am led to believe that a more just and satisfactory rule would be to make the price to be charged for the publication of such notices depend upon the space which they occupy in the columns of the newspaper designated by the Registers.

For the reasons stated, I have concluded to modify the former circular in this respect, and direct that hereafter the maximum charges for such notices shall not exceed five ($5) dollars for each ten lines of space occupied, when a weekly paper is designated as the medium of publication, and seven dollars when a daily newspaper is designated, said sums to be in full payment for publication in each issue of the newspaper designated for the entire period required by law.

It should be borne in mind that these notices must not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates are established upon the understanding that they are to be in the usual body-type, as nonpariel.

For the publication of citations in contests or hearings involving the character of lands, the charges shall not exceed eight ($8) dollars for five publications in weekly newspapers, or ten ($10) dollars for publication in daily newspapers for thirty-one days.

You will give due notice hereof to all persons interested.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

CHAPTER XV.

DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

No. 1. Achison v. Peterson, water right.
No. 2. Basey et al. v. Gallagher, water right.
No. 3. Heydenfeldt v. Daney G. and S. Mining Co., sections 16 and 36, in the State of Nevada.
No. 4. Forbes v. Gracey, right of State to tax.
No. 5. Davis v. Alroyd, mechanic's lien.
No. 6. Water and Mining Company v. Bugbey, grant of sections 16 and 36 to the State of California.
No. 7. McGarrahan v. Mining Company, execution of patent.
No. 8. Jennison, Executor of Titcomb, v. Kirk, water rights and mining claim in California.
No. 9. Flagstaff Mining Co. v. Tabert, question of location.
No. 10. Campbell v. Rankin, value of records in a mining district as evidence.
No. 11. Mining Company v. Taylor, ejectment.
No. 12. Ivanhoe Mining Co. v. Keystone Consolidated Mining Co,
No. 13. United States ex rel. Thomas McBride v. Carl Schurz.

No. 1. ACHISON v. PETERSON.

(Reported in 20 Wallace, 507.)

1. On the mineral lands of the public domain in the Pacific States and Territories, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, are inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection; their prior appropriation gives the better right to running waters to the extent, in quantity and quality, necessary for the uses to which the water is applied.

2. What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case; and in controversies between him and parties subsequently claiming the water, the question for determination is whether his use and enjoyment of the water to the extent of the original appropriation have been impaired by the acts of the other parties.

3. Whether, upon a petition or bill asserting that the prior rights of the first appropriator have been invaded, a court of equity will interfere to restrain the acts of the party

complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

No 2. BASEY ET AL. v. GALLAGHER.

(Reported in 20 Wallace, 670.)

1. In the Pacific States and Territories a right to running waters on the public lands of the United States for purposes of irrigation, may be acquired by prior appropriation, as against parties not having the title of the government. The right, exercised within reasonable limits, having reference to the condition of the country, and the necessities of the community, is entitled to protection. This rule obtains in the Territory of Montana, and is sanctioned by its legislation.

2. By the act of Congress of July 26, 1866, which provides "that whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," the customary law with respect to the use of water, which had grown up among occupants of the public land under the peculiar necessities of their condition, is recognized as valid. That law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, will control.

No. 3. HEYDENFELDT v. DANEY GOLD AND SILVER MINING COMPANY.

(Reported in 3 Otto, 634.)

Error to the Supreme Court of the State of Nevada.

This is an action of ejectment, brought by Heydenfeldt in the district court of the first judicial district of Nevada,

against the Daney Gold and Silver Mining Company. The case was tried by the court, which found the following facts:

On the fourteenth day of July, 1868, the State of Nevada issued to one William Webelhuth its patent for the west half of the south-west quarter of section 16, township 16 north, range 21 east (lying in Lyon county, State of Nevada), Mount Diablo base and meridian, containing eighty acres according to the official plat of the survey of public lands as made by the United States surveyor-general for the district of Nevada; which said patent was recorded in the recorder's office of the county of Lyon, on the twenty-fifth day of July, 1868, and was issued by the State authorities under and by virtue of the statute of Nevada, conveying lands assumed to have been granted to the State by the act of Congress approved March 21, 1864, entitled "An act to enable the people of the Territory of Nevada to form a State government upon certain conditions."

On the eighteenth day of August, 1873, William Webelhuth, by deed of conveyance duly signed, sealed, and acknowledged, conveyed the same premises to one Philip Kitz, which deed was recorded in the recorder's office of the county of Lyon, January 13, 1874.

On the ninth day of January, 1874, Philip Kitz, by deed duly signed, sealed, and acknowledged, conveyed the same premises to this plaintiff, which said deed was duly recorded in the recorder's office of the county of Lyon on the same day.

The defendant is in possession of the premises. The plaintiff, prior to bringing this action, demanded the possession thereof, but the same was refused.

On the second day of March, 1874, the United States, by its proper authorities, granted to the defendant, by its patent, in due and regular form, lot No. 72, embracing a portion of section 16, in township 16, north of range 21 east, Mount Diablo meridian, in the Devil's Gate mining district, in the county of Lyon, and State of Nevada, in the district of lands subject to sale at Carson City, embracing thirteen (13) acres and seventy-eight one hundredths (78-100) of an acre, more or less, with the exclusive right of possession and enjoyment of all the land included within the ex-

terior lines of the survey of said premises, not expressly excepted, and of two thousand linear feet of Mammoth lode ledge, vein, or deposit for said two thousand feet therein throughout its entire depth, etc., which said grant, by the patent, covers and includes the lands and premises sought to be recovered by the plaintiff from the defendant in this action, and which said patent was so issued to the defendant under and by virtue of the act of Congress approved July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public land, and for other purposes;" the act amendatory thereof, approved July 9, 1870, and the act approved May 10, 1872, entitled "An act to promote the development of the mining resources of the United States."

The land in controversy is mineral land, containing precious metals, and the defendant is in possession, and is conducting and carrying on the business of mining thereon, having in the prosecution of mining erected and constructed improvements of the value of over eighty thousand dollars.

In 1867, and prior to the date of the survey or approval of the survey of section 16, township 16 north, range 21 east, by the United States, the defendant's grantors and predecessors in interest had entered upon the premises described by plaintiff in his complaint for mining purposes, and had claimed and occupied the same in conformity to the laws, customs, and usages of miners in the locality and mining district in which said premises are situated, and were so possessed and engaged in mining thereon when the said land was first surveyed, and when the State of Nevada issued its patent, as aforesaid, to William Webelhuth.

Thereupon, as conclusions of law, the court found:

The act of Congress approved March 21, 1864, enabling the people of the Territory of Nevada to form a constitution, etc., under and by virtue of which act the State of Nevada selected the land, and sold and conveyed the same to the predecessors in interest of the plaintiff, did not constitute a grant *in præsenti*, but an inchoate, incomplete grant until the premises were surveyed by the United States, and the survey properly approved.

Said survey, and the approval thereof, not having been made prior to the entry thereon and claim thereto by de-

fendant's predecessors in interest for mining purposes, the same was not by said act of Congress, or in any other manner, ever granted by the United States to the State of Nevada.

The entry of defendant's grantors thereon for mining purposes, and their rights thereto, having become established prior to the survey of said section by the United States, the said premises were not included within and did not pass to the State of Nevada, by the granting clause contained in said act of Congress of March 21, 1864, but, on the contrary, were excluded therefrom by reason of their having been previously possessed and occupied by defendant's grantors for mining purposes, in conformity with the mining laws, rules, and customs of miners in the locality where the same was situated, and in conformity with the act of Congress, approved July 26, 1866, granting the right of way to ditch and canal owners over the public lands, and for other purposes.

Thereupon judgment was rendered for the defendant. The Supreme Court of Nevada having affirmed it, the plaintiff sued out this writ of error.

Submitted on printed arguments by Mr. W. E. F. Deal, for the plaintiff in error, and by Mr. C. E. De Long, for the defendant in error.

Mr. Justice Davis delivered the opinion of the court.

The validity of the patent from the State under which the plaintiff claims title, rests on the assumption that sections 16 and 36, whether surveyed or unsurveyed, and whether containing minerals or not, were granted to Nevada for the support of common schools by the seventh section of the Enabling Act, approved March 21, 1864, 13 Stat. 32, which is as follows: "That sections numbered 16 and 36, in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools."

The assumption is not admitted by the United States, who, in conformity with the act of Congress of July 26, 1866, 14 Stat. 251, issued to the defendant a patent to the

land in controversy, bearing date March 2, 1874. Which is the better title is the point for decision. As it has been the settled policy of the government to promote the development of the mining resources of the country, and as mining is the chief industry in Nevada, the question is of great interest to her people.

It is true that there are words of present grant in this law; but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. "It is better always," says Judge Sharswood, "to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction." Gyger's Estate, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurdity, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration.

Congress, at the time, was desirous that the people of the Territory of Nevada should form a State government and come into the Union. The terms of admission were proposed, and, as was customary in previous enabling acts, the particular sections of the public lands to be donated to the new State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the national domain within that Territory.

But this condition of things did not deter Congress from making the necessary provision to place, in this respect, Nevada on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, operating at once, and attaching prior to

the survey by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the mean time, further improvements would be arrested, and the persons who prior to the surveys had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the specified sections. Congress was fully advised of the condition of Nevada, of the evils which such a measure would entail upon her, and of all antecedent legislation upon the subject of the public lands within her bounds. In the light of this information, and surrounded by these circumstances, Congress made the grant in question. It is ambiguous; for its different parts can not be reconciled if the words used receive their usual meaning. Schulenberg v. Harriman, 21 Wall. 44, establishes the rule that, "unless there are other causes in a statute restraining the operation of words of present grant, these must be taken in their natural sense." We do not seek to depart from this sound rule; but, in this instance, words of qualification restrict the operation of those in present grant. Literally construed, they refer to past transactions; but evidently they were not employed in this sense; for no lands in Nevada had been sold or disposed of by any act of Congress. There was no occasion of making provision for substituted lands; if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State, Congress can not be supposed to have intended a vain thing, and yet it is quite certain that the language of the qualification was intended to protect the State against a loss that might happen through the action of Congress, in selling or disposing of the public domain. It could not, as we have seen, apply to past sales or dispositions, and, to have any effect at all, must be held to apply to the future.

This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which in its effects would be unjust to the people of the territory. Besides, no other construction is consistent with

the statute as a whole, and answers the evident intention of its makers to grant to the State *in præsenti* a quantity of lands equal in amount to the sixteenth and thirty-sixth sections in each township.

Until survey Congress reserved power over the granted sections.

Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if, in exercising it, the whole or any part of a sixteenth or thirty-sixth section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests.

It is argued that, conceding the soundness of this construction, the defense can not be sustained, because the land in controversy was not actually sold by direction of Congress until after the survey. This position ignores a familiar rule in the construction of statutes, that they must be so construed as to admit all parts of them to stand, if possible: 1 Bouv. Inst., p. 42, sec. 7. The language used is, "sold or otherwise disposed of by any act of Congress." The point made by the plaintiff would reject a part of these words, and defeat one of the main purposes in view. Congress knew, as did the whole country, that Nevada was possessed of great mineral wealth, and that lands containing it should be disposed of differently from those fit only for agriculture. No method for doing this had then been provided; but Congress said to the people of the Territory: "You shall, if you decide to come into the Union, have for the use of schools, sections numbered sixteen and thirty-six in every township, if, on survey, no one else has any valid claim to them; but until this decision is made and the lands are surveyed, we reserve the right either to sell them or dispose of them in any other way that commends itself to our judgment. If they are sold or disposed of, you shall have other lands equivalent thereto."

The right so reserved is subject to no limitation, and the wisdom of not surrendering it is apparent. The whole

country is interested in the development of our mineral resources, and to secure it adequate protection was required for those engaged in it. The act of Congress of July 26, 1866, *supra*, passed before the land in controversy was surveyed, furnishes this protection, by disposing of the mineral lands of the United States to actual occupants and claimants, and providing a method for the acquisition of title. The defendant, and those under whom it claims, occupied the land prior to the survey, and were entitled to the purchase.

Patent relates back to original location.

The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right to the exclusion of all adverse intervening claims.

These views dispose of this case; but there is another ground equally conclusive. Congress on the fourth of July, 1866, 14 Stat. 85, by an act concerning lands granted to the State of Nevada, among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction of the grant under consideration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of February 13, 1867, ratified that construction and accepted the grant with conditions annexed.

We agree with the Supreme Court of Nevada, that this acceptance "was a recognition by the legislature of the State of the validity of the claim made by the government of the United States to the mineral lands."

It is objected that the constitution of Nevada inhibited such legislation; but the Supreme Court of the State, in the case we are reviewing, held that it did not: 10 Nev. 314; and we think their reasoning on this subject is conclusive.

Judgment affirmed.

No. 4. FORBES v. GRACEY.

(Reported in 4 Otto, 762.)

Mr. Justice Miller delivered the opinion of the court.

This was a suit brought by appellant to enjoin the collector of taxes for Storey county, Nevada, from collecting a tax imposed by the law of that State upon the property of the Consolidated Virginia Mining Company, the appellant being a stockolder in the company, and an alien, subject of the Queen of Great Britain. The tax is, by the State statute, imposed upon the proceeds of the mine worked by the corporation, and is resisted on the ground that the title to the land from which the mineral is taken, is in the United States, and is not for that reason liable to State taxation.

The case is prepared and submitted to us on printed arguments in the very last days of the term, and we are urged to decide it on the ground that it involves a question of vast interest to all the mining operations in the Pacific States, and is of vital importance to the State of Nevada, as it affects her largest source of revenue. In view of its importance, we should postpone the decision until next term, if the questions presented were either doubtful or difficult of solution. We think a very few words—all we can give to the subject at this late day—will show that it is neither.

It is very true that Congress has, by statute, and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for these ores, and without requiring the miner to buy or pay for the land.

Congress has recognized possessory rights.

It has gone further, and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. (See Revised Statutes, title XXXII, chap. 6, secs. 2318–2352.) But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject.

Tax levied on property right of the United States, void.

If the tax of the State of Nevada is, in point of fact, levied on this property right of the United States, we are bound by our previous decisions and by sound principle, to hold that it is void.

If on the property of the miner, otherwise.

If, on the other hand, it is levied on property of the miner, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the State in its collection. A few extracts from the statute of Nevada, showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the act of February 28, 1871, imposing this tax:

"SECTION 1. All ores, tailings, and mineral-bearing material of whatever character, shall be assessed for purposes of taxation for State and county, in the following manner: From the gross yield, return, or value of all ores, tailings, or mineral-bearing material of whatever character, there shall be deducted the actual cost of extracting said ores as mineral from the mine, the actual cost of saving said tailings, the actual cost of transportation of said ores, mineral-bearing material, or tailings to the place of reduction or sale, and the actual cost of such reduction or sale, and the remainder shall be deemed the net proceeds, and shall be assessed and taxed as provided for in this act; *Provided*, that in no case whatsoever shall the whole amount of deductions allowed to be made in this section from the gross yield, return, or value of said ore, mineral-bearing material, or tailings, exceed the percentage of gross yield, value, or return of such ore, mineral, or tailings, as hereinafter specified; on all ores, tailings, or mineral-bearing material the gross yield or value of which is $12 per ton or less, the whole amount of deduction shall not exceed ninety per cent. of such gross yield, return, or value; on all ores, tailings, or mineral-bearing material, the gross yield, value, or returns of which is over $12, and

under $30 per ton, the whole amount of deductions shall not exceed eighty per cent. of such gross yield, value, or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is over $30 and less than $100 per ton, the whole amount of deductions shall not exceed sixty per cent. of such gross yield, value, or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is $100 per ton or over, the whole amount of deductions shall not exceed fifty per cent. of such gross yield, return, or value; *Provided*, that an additional exemption of $15 per ton may be allowed on all ores, tailings, or minerals worked by the Frieburg process.

"SEC. 2. It shall be the duty of the several county assessors within this State to compare and complete quarterly, on or before the second Monday in February, May, August, and November in each year, a tax list or assessment roll of the proceeds of the mines, alphabetically arranged, in a book furnished them by the board of county commissioners for that purpose, in which book shall be listed or assessed the proceeds of all mines in their respective counties, as provided in this act."

"SEC. 6. Every tax levied under the authority or provision of this act on the proceeds of the mines, is hereby made a lien on the mines or mining claims from which ores or minerals bearing gold or silver, or either or any other valuable metal, is extracted for reduction, which lien shall attach on the first days of January, April, July, and October of each year, for the quarter year commencing on those days respectively, and shall not be satisfied or removed until the taxes, as provided in this act, or on the proceeds of the mines, are all paid, or the title to said mines or mining claim is absolutely vested in a purchaser, under a sale for the taxes levied on the proceeds of such mines or mining claims."

"SEC. 10. The collection of the tax authorized to be levied under this act shall be enforced in the same manner in which the tax on any other kind of personal property is enforced and collected."

What is this manner of enforcement is to be found in section 110 of a previous statute, which reads as follows:

"At any time while the assessment roll of any quarter is in the hands of the assessor for collection, the assessor may seize upon the personal property, or so much thereof as may be sufficient to satisfy the taxes and costs of any person, firm, corporation, association, or company who shall neglect or refuse to pay such taxes for one week after such demand of the assessor or his deputy, and shall post a notice of such seizure, with a description of the property and the time and place whereon it will be sold, in three public places in the township or precinct where it is seized, and shall, at the expiration of five days, proceed to sell at public auction, at the time and place mentioned in the notice, to the higher bidder for cash, a sufficient quantity of such property to pay the taxes and costs incurred."

From the first section of the statute, we ascertain what it is that is taxed, namely, all the ores, tailings, or mineral-bearing material of whatever character, after deducting the actual cost of extracting said ores as mineral from the mines, and other expenses, such as transporting them to the place of reduction, etc.

From this it is clear that it is the ore after it has been separated from the bed in which it is found, and its proceeds and products, which are taxed, and not the ore or mineral in the earth. Indeed, this latter idea is not advanced by any one, and it would be preposterous.

Ore detached from the soil personal property.

As we construe the statutes of the United States, and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is imbedded, it becomes personal property, the ownership of which is in the man whose labor, capital, and skill has discovered and developed the mine, and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State, as any other personal property is.

The truth of this proposition is too obvious to need or admit of illustration or elaboration, and, as we have already said, the pressure of business does not admit of it.

In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last

cited, it does not seem to us that there can be any reasonable ground for asserting that the United States has any interest in the tax, or in the sale of the property taxed. It is, however, urged with more show of reason that section 6, which makes this tax "a lien on the mine or mining claims from which the ores or minerals, bearing gold or silver, are extracted for reduction," is an interference with the right of property of the government in the lands in which the mineral remains are extracted.

An examination of the language we have quoted will show that it was carefully prepared to avoid this objection, and we think it does. The use of the words "mines or mining claims" is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining districts, and what is, as we have said, recognized by the act of Congress, as a mining claim. In the first case, the statute makes the tax a lien on the mine, because the title to the mine is in the person who owes and should pay the tax. In the other, the tax is a lien only on the claim of the miner; that is, on his possessory right to explore and work the mine under the existing laws and regulations on the subject.

In the former case, of course, the United States has no interest to be protected, and the State is at liberty to declare and enforce such a lien for her taxes. In the latter, also, such right as the mining laws allow and as Congress concedes to develop and work the mines is property in the miner, and property of great value. That it is so, is shown most clearly by the conduct of the mining corporation in whose interest this suit is brought, which, for the purpose of evading this tax, permits its investment in this mine, said to be worth from fifty to a hundred million of dollars, to rest on this claim, this mere possessory right, when it could, at a ridiculously small sum compared to the value of the mine, obtain the Government's title to the entire land, soil, mineral, and all. Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific-coast States. They are property in the

fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal Government. This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it.

We are of opinion that the decree of the Circuit Court dismissing the bill of appellant on demurrer was right.

It is therefore affirmed.

Mr. Justice Field took no part in the decision of this case.

No. 5. DAVIS v. ALVORD.

(Reported in 5 Otto, 545.)

Involves laborers and mechanics' liens in Montana, Territory.

No. 6. WATER AND MINING COMPANY v. BUGBEY.

(Reported in 6 Otto, 165.)

1. The act of March 3, 1853 (10 Stat. 244), granted for school purposes to California the public lands within sections 16 and 36 in each congressional township in that State, except so much of them whereon an actual settlement had been made before they were surveyed, and the settler claimed the right of pre-emption within three months after the return of the plats of the surveys to the local land office. If he failed to make good his claim, the title to the land embraced by his settlement vested in the State as of the date of the completion of the surveys.

2. In this case, the title of the State to the demanded premises being part of a school section, having become absolute May 19, 1866, a mining company could, under the act of July 26, 1866 (14 Stat. 253), acquire no right to them.

No. 7. McGARRAHAN v. MINING COMPANY.

(Reported in 6 Otto, 316.)

1. The statutory provisions prescribing the manner in which a patent of the United States for land shall be executed, are mandatory. No equivalent for any of the re-

quired formalities is allowed, but each of the integral acts to be performed is essential to the perfection and validity of such an instrument. If, therefore, it is not actually countersigned by the Recorder of the General Land Office in person, or, in his absence, by the principal clerk of private land claims as Acting Recorder, it is not executed according to law, and does not pass the title of the United States.

2. The record in the volume kept for that purpose at the General Land Office at Washington, of a patent which has been executed in the manner which the law directs, is evidence of the same dignity, and is subject to the same defenses as the patent itself. If the instrument, as the same appears of record, was not so executed, and was therefore insufficient on its face to transfer the title of the United States, the record raises no presumption that a patent duly executed was delivered to and accepted by the grantee.

3. The act of March 3, 1843 (5 Stat. 627), in relation to exemplifications of records, does not dispense with the provisions of law touching the signing and countersigning. The record, to prove a valid patent, must still show that they were complied with. The names need not be fully inserted in the record, but it must appear in some form that they were actually signed to the patent when it was issued.

4. The failure to record a patent does not defeat the grant.

No. 8. JENNISON, EXECUTOR OF TITCOMB, v. KIRK.

(Reported in 8 Otto, 453.)

Water Rights and Mining Claims in California.

Mr. Justice Field delivered the opinion of the court.

In 1873 the plaintiff's testator constructed a ditch or canal in Placer county, California, to convey the waters of a canyon and of tributary and intermediate streams, to a mining locality known as Georgia Hill, distant about seventeen miles, for mining, milling, and agricultural purposes, and for sale. The ditch was completed in December of that year, and immediately thereafter the waters of the canyon were turned into it. The ditch had a capacity to carry a thousand inches of water, and it is alleged that during the rainy season of the year in California, which extends from about the first of November to the first of April,

the canyon, tributaries, and intermediate streams would supply that quantity, and during the dry season not less than one hundred inches. The intention of the testator, as declared on taking the initiatory steps for their appropriation, was to divert two thousand inches of the waters by means of a flume and ditch.

In its course to Georgia Hill, the ditch crossed a gulch or canyon in the mountains known as Fulweiler's gulch, the waters of which had been appropriated some years before by the defendant, who had constructed ditches to receive and convey them to a reservoir, to be used as needed. One of these ditches in the gulch was intersected by the ditch of the testator, and the waters which otherwise would have flowed in it were diverted to his ditch. The defendant thereupon repaired and opened his own ditch, turning into it the waters which had previously flowed in it, and in so doing, cut and washed away a portion of the ditch of the testator, so as to let out the waters brought down from the canyon above and the intermediate streams. It is for alleged damages thus caused to the testator, and to restrain the continuance of the alleged injury to his ditch and any interference with its use, that the present action was brought.

The defendant not only justified the cutting of the testator's ditch in the manner stated, because necessary for the repair and reopening of his own ditch, and to retain the waters of the gulch previously appropriated and used by him, but on the further ground that the ditch of the testator traversed mining claims owned many years before by him, or those through whom he derived his interest, and would prevent their being successfully worked.

It appears from the answer, which the court finds to be correct in this particular, that for many years prior to this action, the defendant, or his grantors and predecessors in interest, had been in the possession of a portion of Fulweiler's gulch, extending from a point about one thousand two hundred feet below the crossing of the testator's ditch, to a point about one thousand two hundred feet above it, including the bed of the gulch and fifty feet of its banks on each side; that during this period the ground was continuously held and worked for mining purposes and as a mining

claim, in accordance with the usages, customs, and laws of miners in force in the district; that in working the claim and extracting the gold, the method employed was what is termed "the hydraulic process," by which a large volume of water is thrown with great force through a pipe or hose upon the sides of the hills, and the gold-bearing earth and gravel are washed down, and the gold so loosened that it can be readily separated; and that the ditch of the testator traversed the immediate front and margin of this gold-bearing earth and gravel, rendering the same inaccessible from the outlets of the gulch, down which they would be washed, thus practically destroying, if allowed to remain, the working of the mining ground.

On the argument, it was admitted that the defendant's right of way for his ditch was superior to the testator's right of way for the one owned by him, being earlier in construction, and the waters of the gulch being first appropriated; and, therefore, that the duty rested upon the testator, and since his death upon his executor, to so adjust the crossings of the ditches as not to interfere with the full use and enjoyment by the defendant of his prior right. It was contended that such crossings had been so adjusted by the testator, but were destroyed by the defendant.

It was also admitted that the extension of the testator's ditch, at the place where it was constructed across the claim of the defendant, prevented the successful working of the claim; but as the land over which the ditch passed, and on which the claim is situated, is a portion of the public domain of the United States, it was contended that the right of way for the ditch was superior to the right to work the claim; and that such superior right was conferred by the ninth section of the act of Congress of July 26, 1866. That section enacted: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purpose aforesaid, is hereby acknowledged and confirmed: *Provided*, however,

that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (14 Stat. 253.)

[There are some verbal changes in this section as re-enacted in the Revised Statutes, but none affecting the substance and meaning.]

The position of the plaintiff's counsel is, that of the two rights mentioned in this section only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws, and decisions of the courts; and that the right of way over such lands for the construction of ditches and canals is conferred absolutely upon those who have acquired the water-right, and is not subject in its enjoyment to the local customs, laws, and decisions. This position we think can not be sustained. The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.

The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain

rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines, distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery followed by appropriation as the foundation of the possessor's title, and development by working as the condition its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried greater distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains, and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption.

Numerous regulations were adopted, or assumed to exist from their obvious justness, for the security of these ditches

and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and molded by the courts, and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866 no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government.

The Senator of Nevada,* the author of the act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The Legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and when not in

* Hon. Wm. M. Stewart.

conflict with the constitution or laws of the State or the United States, should govern their determination, and a series of wise judicial decisions had molded these regulations and customs into "a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth which, when found, was protected by no higher law than that enacted by himself under the implied sanction of a just and generous government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached.*

These statements of the author of the act in advocating its adoption can not, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners, in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and molded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to

* Cong. Globe, first Session, thirty-ninth Cong., Part IV., pp. 3225–3228.

grant rights of way where they were not previously recognized by the customary law of miners. The section purports in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws, and decisions of the court; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," can not be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section confers no additional rights upon the owners of ditches subsequently construed; it simply renders them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said that whenever rights to the use of water by priority of possession have become vested, and are recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, "should be acknowledged and confirmed;" but where ditches subsequently constructed injure by their construction the possession of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts.

This view of the object and meaning of the ninth section was substantially taken by the Supreme Court of California in the present case; it was adopted at an early day by the land department of the government, and the subsequent legislation of Congress respecting the mineral lands is in harmony with it.*

By the customary law of miners in California, as we un-

* Letter of Commissioner Wilson of November 23, 1869, Copp's U. S. Mining Decisions, 24; Acts of Congress of July 9, 1870, and May 10, 1872, Revised Stats., title 32, chap. 6.

derstand it, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. In the present case the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that so far as the flow of the water was concerned this was done. Had there been nothing further in the case the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining claim by the hydraulic process. The position of the testator's ditch prevented this working; and thus deprived him of this value of the water and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch, by the defendant, this having been done "in the exercise, use, and enjoyment of his own water rights in the usual and in a reasonable manner," as found by the court, and in order that his claim might be worked as before, was not, therefore, an injury for which damages could be recovered.*

Judgment affirmed.

* The customary law of miners, as stated in the opinion, is not applicable in California to controversies arising between them, or ditch owners, and occupants of the public lands for agricultural or grazing purposes. It has been the general policy of the State "to permit settlers in all capacities to occupy the public lands, and by such occupation to acquire the right of undisputed enjoyment against all the world but the true owner." Tarter v. Spring Creek Co., 5 Cal. 398. But at an early date an exception was made to this policy in cases where the interests of agriculturists and of miners conflicted. By an act passed April 20, 1852, a right of action was given to any one settled upon the public lands for the purpose of cultivating or grazing against parties interfering with his premises, or injuring his lands where the same was designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent, with a proviso, however, that if the lands contained mines of precious metals, the claim of the occupant should not preclude any persons desiring to do so from working the mines "as fully and unreservedly as they

No. 9. MINING COMPANY v. TARBET.

(Reported in 8 Otto, 463.)

Error to the Supreme Court of the Territory of Utah.

Mr. Justice Bradley delivered the opinion of the Court.

This was an action in the nature of trespass *quare clausum fregit*, brought in the District Court of the Territory of Utah for the third district, by Alexander Tarbet, and continued by his assignee, Helen Tarbet, against the Flagstaff Silver Mining Company of Utah (limited) and other persons. The action having been dismissed as to the other persons, judgment was rendered for $45,000 damages, upon the verdict of a jury, against the company. The latter carried the case to the Supreme Court of the Territory, where the judgment was affirmed, on the third day of June, 1878. The company thereupon sued out this writ of error.

The controversy relates to the working of a mine in Little Cottonwood Mining District, in the county of Salt Lake. The defendant in error claims to own, and to have been in possession of, a mining location on a lode called the Titus lode, the location including three claims, and extending six hundred feet westwardly from the discovery, with a width of two hundred feet on the east side of the discovery belonging to the South Star mine. The plaintiff in error owned and had a patent for another mining location, called the Flagstaff mine, one hundred feet in width and two thousand six hundred feet in length, running in a northerly and southerly direction, and crossing the Titus claims near

might or could do had no possession or claim been made for grazing or agricultural purposes. Statutes of 1852, p. 158.

Under this act, the Supreme Court of the State held that miners, for the purpose simply of mining, could enter upon the land thus occupied, but that the act legalized what would otherwise have been a trespass, and could not be extended by implication to a class of cases not specially provided for. Accordingly, ditches constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated. Stoakes v. Barrett, 5 Cal. 37; McClinton v. Bryden, Id. 97; Fitzgerald v. Urton, Id. 308; Burge v. Underwood, 6 Id. 46; Wermer v. Lowery, 11 Id. 104.

Since these decisions there has been some legislation in the State, permitting water to be conveyed, upon certain conditions, across the lands of others. Such legislation, if limited to merely regulating the terms upon which possessory rights subsequently acquired on the public lands in the State may be enjoyed in the absence of title from the United States, may not be open to objection.

the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine, the plaintiffs in error worked around subterraneously, to a point some three hundred feet to the east of their location, and on the north side of the Titus mine, and within about one hundred feet of the Titus location. It is for this working that the suit was brought, and the principal question is, whether the plaintiff in error had a right thus to work outside of its location on the east, and whether, in doing so, it interfered with the rights of the defendant in error. It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiff in error relates as its starting point, is situated nearly due west from that of the South Star and Titus, and about five hundred and fifty feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These croppings, however, show that the direction or course of the apex of the vein at or near the surface is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to the plaintiff in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being north-easterly, it happens that, by following a level beneath the surface, the strike of the vein runs in a north-westerly direction of about fifty degrees west. In other words, if by a process of abrasion the mountain could be ground down to a plain, the strike of the vein would be north-west, instead of west, as it now is on the surface, or, at least, as the evidence tended to show that it is. In that case, the location of the defendant in error would leave the vein to its right, and the location of the plaintiff in error would not reach it until several hundred feet to the north of the Flagstaff discovery.

Evidence having been given *pro* and *con* in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon, by both parties, the judge charged the jury as follows: "If you find that

Alexander Tarbet, during the time mentioned in the complaint, to wit, from January 1, 1873, to December 14, 1875 (being a period of two years, eleven months, and fourteen days), was in possession of the whole or an undivided interest of Nos. 1, 2, and 3, of the Titus mining claim, and ten feet off No. 1, of the South Star mining claim, holding the same in accordance with the mining laws and the customs of the miners of the mining district; and that the apex and course of the vein in dispute is within such surface; then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth, on its dip through the vein in its dip downward the side line of the surface boundary, and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line on its dip, is limited in two ways, by the length of the course of the vein within the surface; and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein, is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

The court refused to give the following instructions propounded by the plaintiff in error, to wit: "By the act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode as such, irrespective of the surface area, which an

applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee-simple title to the lode to the full extent located and claimed under said act."

Secondly. "In the very nature of the thing, a lode or vein in its unworked and undeveloped stage can not be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent, under the act of 1866, was a diagram of the surface area claimed, and this diagram might be extended laterally and otherwise, as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the court below; namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction.

The plaintiff in error has made the following assignment of error which indicates the position which it contends for:

"The plaintiff in error assigns for error the charge of the court, and the refusal to give its requests; that is, that the judge instructed the jury that the defendant below had shown no title or color of title to any part of the vein, except so much of its length on its course as lies within the surface ground patented; and that he refused to direct the jury that by the act of Congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode irrespective of the surface area, which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface ground patented does not measure the grantee's right to the vein or lode in its course, or control the direction which he shall take; and lastly, that the Flagstaff company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

Both parties agree in the general rule that the owner of a mining right in a lode or vein can not follow the course of the vein beyond the end lines of his location extended perpendicularly downwards, but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miners' laws, and the true construction of the act of Congress. The language of the act of 1866 (14 Stat. 251), in relation to "vein or lode," is "that no location hereafter made shall exceed two hundred feet in length *along the vein* for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein *to any depth*, with *all its dips, variations, and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules," etc. The act of 1872 (17 Id. 91) is not explicit in its terms; but the intent is undoubtedly the same, as it repeats end lines and side lines, and the right to follow the dip outside of the latter.

Locations shall be made lengthwise of vein or lode.

We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines can not be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that

one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

Side lines become end lines.

The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, which lines are those which are crosswise of the general course of the vein on the surface.

The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width, according to the dip of the vein. See Rockwell, 56–58, 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended, and requested the court to charge, in effect, that having received a patent for two thousand six hundred feet in length and one hundred feet in breadth, commencing at the Flagstaff discovery, on the lode at the surface, it was entitled to two thousand six hundred feet of that lode along its length, although it diverged from the location of the claim, and went off in another direction. We can not think that this is the intent of the law. It would lead to inextricable confusion. Other localities correctly laid upon the lode, and coming up to that of the plaintiff in error on either side, would, by such a rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein further that it continued substantially to correspond with it. Of what use would a loca-

tion be, for any purpose of defining the rights of parties, if it could thus be made to cover a lode or vein which runs entirely away from it? Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it and not interfere with their right, he might probably do so; but no farther, and this consequence would follow irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.

We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed.

The course of a vein is that which is indicated by surface outcrop.

The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims, belonging to the defendant in error, were located along the vein or lode in question in a proper manner; and the Flagstaff claims,

belonging to the plaintiff in error, were located across it, and can only give the latter a right to so much of the vein or lode as is included between their side lines. The court below took substantially this view of the subject, and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiff in error. The question was presented in different forms, but all to the same general purport.

Judgment affirmed.

No. 10. CAMPBELL v. RANKIN.

(Reported in 9 Otto, 261.)

1. While the record of a mining district is the best evidence of the rules and customs governing its mining interests, it is not the best or the only evidence of the priority or extent of a party's actual possession.

2. The fifth section of the act entitled "An Act to promote the development of the mining resources of the United States," approved May 10, 1872 (17 Stat. 91), gives no greater effect to the record of mining claims than is given to the records kept pursuant to the registration laws of the respective States, and does not exclude as *prima facie* evidence of title proof of actual possession and of its extent.

No. 11. MINING COMPANY v. TAYLOR.

(Reported in 10 Otto, 37.)

1. In ejectment for an undivided interest in a mining claim in Nevada, where both parties derive title from the original owner, the validity and regularity of his location are not in question.

2. Where the plaintiff was a tenant in common with the defendants, their possession of the claim was his possession until he was ousted. The Statute of Limitations would then run against him, but not bar his recovery, unless after such ouster their adverse possession was maintained two years before the commencement of the suit.

The statute of limitations of that State, as construed by its Supreme Court, excepts from its protection a foreign corporation.

3. *A conveyance in writing is not necessary to the valid transfer of a mining claim.*

No. 12. IVANHOE MINING COMPANY v. KEYSTONE CONSOLIDATED MINING COMPANY.

In error to the Circuit Court of the United States of the District of California.

Mr. Justice Miller delivered the opinion of the court.

The action in this case was brought originally in the State court of California by Daniel W. Gillette against the present defendant in error, to recover possession of the east half of section thirty-six, in township seven north, range ten east of Mount Diablo meridian, and in the progress of the case it was transferred to the circuit court of the United States, where judgment was rendered in favor of the defendant. The plaintiff in error having been substituted for Gillette, as his successor in interest, the case was submitted to the court by the parties waiving a jury.

The plaintiff asserted title to the land in controversy under a patent from the State of California, and the defendant under patents from the United States. The title of California rests upon the act of Congress granting that State the sixteenth and thirty-sixth sections of every township for school purposes, and that of defendant on the acts of Congress concerning the possession and sale of the mineral lands.

As the question to be decided necessarily involves the title to much other mineral land in California, in which the authorities of the State of California and the officers of the land department of the United States entertain and act upon conflicting views of the rights of the State and the general government, the State of California, by her counsel, and the United States, by the Attorney-general, have been permitted to take part in the argument.

The defendant only claims part of the land embraced in plaintiff's patent, and denies possession of that for which no title is asserted, and as no possession is proved beyond that for which the defendant defends, only that is in controversy.

The court below finds that this is mineral land, and that the patent of the United States was issued to defendant for three several mining claims, to wit, the Spring Hill, the Geneva, and the Keystone. That the Spring Hill was located in May, 1851, the Keystone in 1853, and the Geneva

in October, 1863; and that the original locators of said claims and their grantees have held undisturbed possession thereof ever since, and by such possession and the working of said mines, the possessory title was vested in defendant at the time it filed its application for said patent in the land office of the United States at Sacramento, January 6, 1871, unless the State of California had acquired title to section thirty-six by grant from the United States. It also appears that on the land thus claimed by plaintiff a mining town, called Amador city, exists, of about four hundred or five hundred people, which began in 1850, and reached the number mentioned in 1853, with many dwelling-houses, and some forty acres cultivated by the owners of the Keystone mining claim.

On the eighteenth of June, 1870, one Henry Casey applied to the State authorities to purchase the half-section of land on which this town and these mining claims were located, and a State patent was issued to his vendee, Gillette, October 3, 1872.

The township in which this land was surveyed in the field in March, 1870, the survey approved September 3, 1870, and a plat filed in the United States land office at Sacramento, October 7, 1870; and within three months after this latter date the application of the defendant was made for patents for the three mining claims, and the patents issued July 14, 1873.

The right to these patents, and the claim of the town of Amador city, were contested before the Register and Receiver, the Commissioner of the General Land Office, and the Secretary of the Interior, by the State of California, and the parties claiming under her, and the decision was adverse to the title of the State.

The question, and the only question, presented for our consideration, is very sharply presented by this statement of facts and by the acts of Congress pertinent to the subject; and it is whether under these acts the title of the land in question became fixed and vested absolutely in the State of California on the ascertainment by the survey of 1870, that it was part of the thirty-sixth section of the township in which it lies.

The act of March 3, 1853, under which the right of the

State of California to the school land arises, has been the subject of construction in this court more than once heretofore, and the decision of the question before us requires a further critical examination of its provisions. The first five sections of it provide for the establishment of the offices of Surveyor-general, two land offices, with Registers and Receivers, and for the organization of the general land system of the United States, including surveys; and it then proceeds to lay down the rules by which rights to the public lands may be acquired. The granting clause of the sixteenth and thirty-sixth sections of the public lands as thus surveyed, to the State of California, is as follows:

"SEC. 6. And be it further enacted, that all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting, also, the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the preemption laws, of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the Register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed."

Section seven of the act may as well be read here, as it is important to a true solution of the question under consideration.

"SEC. 7. And be it further enacted, that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and

twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,' and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

The twelfth section grants to the State seventy-two sections for the use of a seminary of learning, to be selected by the governor or some one appointed by him, in legal subdivisions of not less than a quarter section, of any unsold, unoccupied, and unappropriated public lands, "Provided, that no mineral lands, or lands reserved for any public purposes whatever, or lands to which any settler may be entitled under the provisions of this act, shall be subject to such selection."

The thirteenth section also grants the State ten sections of land for the purpose of erecting the public buildings of the State, with the same proviso as the one to section twelve.

The proviso to the third section is also relied upon as indicative of the purpose of Congress in regard to the mineral lands of California. That section contains the authority under which the Surveyor-general is to act in surveying the public lands in that State, and after investing him with the powers conferred on other Surveyors-general, and some specific directions for the survey of private land claims, it is "provided, that none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked on the field, and were actually necessary to be run."

It is strongly urged by the plaintiff's counsel that the language of the granting clause imports a grant *in præsenti*, and that whenever, by any survey of the government thereafter made, the location of the sixteenth and thirty-sixth sections of a township was ascertained, it establishes the title in the State from the date of the statute, namely, March 3, 1853.

It is quite unnecessary to enter upon this question, which has been before us in so many shapes, for if it be conceded that such would be the effect of the statute if there were no words of exception in the grant, Congress has, in nearly every case where the question has arisen, made such specific exceptions to the operation of the grant as to decide the matter without resort to the rule of construction asserted by plaintiffs.

Take, for instance, railroad grants. Besides the more general reservations from the grant, there is almost always found a provision that where, by the location of the road, the sections on each side of it are ascertained which would pass by the general terms of the grant, those which have been pre-empted, sold, or otherwise disposed, shall not so pass, but the grantee may select other lands in lieu of those, which may be said in this manner to be excepted out of the grant.

This is true of the statute under consideration, and we may pass this branch of the argument by conceding that if the land in controversy is subject to the grant, the title relates to the date of the act of Congress.

Defendants allege that it was not so subject to the grant, for two reasons:

1. That it is mineral land, and that the grant of school lands to the State does not cover any mineral land.

2. That by virtue of the seventh section, such settlement and cultivation had been made on the land, before the survey was made, as to take it out of the grant, and remit the State to the selection of other public land in lieu of this.

We will consider these in their order.

Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State in 1850, was largely composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested by the treaty in the government of the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The

Spanish government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the crown, which made Spain for a time the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that with the territory we had acquired the laws which governed the production of gold from the earth. Others believed that whether this were so or not it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But, while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and before a State could be organized, had become its dominating element, with wealth and numbers and claims which demanded consideration.

Matters remained in this condition, with slight exception, until the year 1866, when Congress passed a law by which title to mineral land might be acquired from the government at nominal prices and by which the idea of a royalty on the product of the mines was forever relinquished. (14 U. S. Statutes, 251.)

During this period, however, from 1849 to 1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies, and in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this act of 1853. As we have said in Sherman v. Buick, 93 U. S. R. 209, the main purpose of that act was to provide for the survey and sale of the public lands and for the right of pre-emption to the settler on these lands, and there was embraced in this clause of pre-emption the grant of the sixteenth and thirty-sixth sections to the State for school purposes. In the very sentence which contains this grant in parentheses, and while introducing the new principle, that the public lands

should be subject to the right of pre-emption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

We say that this introduced a new principle in pre-emption law, for except in a very few cases, no right of pre-emption had before existed until the lands were surveyed, so that the pre-emptor could designate by the description of the congressional survey the precise land to which his pre-emption attached.

But this right of pre-emption, on unsurveyed lands, was by this statute to last but one year, and so careful was Congress to protect mineral land from sale and from pre-emption, that, as we have already shown by the proviso to section 3 of the act, the surveyors were forbidden to extend their surveys over mineral lands.

The effect of this was, as Congress undoubtedly intended it should be, that as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

It is a strong corroboration of this view that Congress in the section (12) of this same statute, giving the State seventy-two sections for a seminary of learning, declares that no mineral land shall be taken under the grant, and makes the same reservations of its mineral lands in the grant for the erection of public buildings in the State.

We find a similar provision in the grant to the Pacific Railroad companies, whose road it was known would pass through some of these mineral regions. By the fourth section of the act of 1864, 13 U. S. Stat. 358, it is declared that neither that act nor the act of 1862 shall be held to include in the grant "any government reservation or min-

eral lands, or the improvements of any *bona fide* settler on any lands *returned or denominated* mineral lands."

As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted, in 1866, a complete system for the sale and other regulation of its mineral land so totally different from that which governs other public lands, as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all, from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes, besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

Mineral lands, known to be such at date of survey, not granted to State.

It follows, from the finding of the court and the undisputed facts of the case, that the land in controversy, being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school section grant.

It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853.

In the case of Sherman v. Buick, we have said in reference to this section that it was unnecessary to decide whether the improvements found on the land when the survey was made and the character of the person owning them should be in all respects those which are prescribed by the general pre-emption law. We are now satisfied that this section prescribes its own rules on that subject, and that whenever, at the time the sections are ascertained by the government survey, there is either a dwelling-house or the

cultivation of any portion of the land, on which some one is residing and is asserting claim to it, the title of the State does not vest, but the alternative right to other land as indemnity does. It is only necessary to look to what we have said in Sherman v. Buick, of the fact that Congress had in view the rapid settlement of the country and the long time which might elapse before it could be known by actual survey where these school sections would be found, to see that a liberal construction must be given to the language by which Congress expresses purpose to protect these settlements, buildings, and cultivations, and that we have no right to add other qualifying incidents to the exercise of this right than those found in the statute. These are not the same required under the general pre-emption law, and we have no right to import the latter into the new statute.

Some of the expressions found in Sherman v. Buick, and in the Natoma Water Co. v. Bugby, 96 U. S. R. 156, are supposed by counsel to convey a different meaning, but in the use of the words pre-emption and pre-emptor, in reference to *this section of the statute*, it was not designed to imply all that was meant by those terms in the act of 1841 and its amendatory adjuncts, but to convey the idea of a settlement and a settler according to the terms of the statute under consideration. Nor is there anything in the principle announced in the latter case, that where a settler abandons his claim to hold the land against the State by virtue of such settlement or improvement, and acknowledges the title of the State by purchase, his improvement or settlement can not be set up by a third person to defeat the title of the State recognized by the United States, which conflicts with what we have just said or with the defendants' rights in the present case. Here the settlement, building, and cultivation have been continuous for twenty years, with constant assertion of claim. The same parties or their privies are still claiming it. None of them have accepted title under the State or acknowledged its right to the land. The government of the United States has given them a patent founded on this very possession, use, and occupation. Nothing in that opinion justifies the construction placed upon it by counsel, and the case is clearly inapplicable to the one before us.

We are of opinion that the settlement, building, and cultivation found as facts by the circuit court bring the case within the provisions of the seventh section of the act of 1853, and necessarily render void the title asserted under the State by plaintiff.

It follows that the judgment of the circuit court is right, and it is accordingly affirmed.

No. 13. UNITED STATES EX REL. THOMAS McBRIDE v. CARL SCHURZ.

In error to the Supreme Court of the District of Columbia.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the District of Columbia.

In that court it was commenced by a petition for a writ of mandamus to compel the Secretary of the Interior to deliver to the relator, McBride, a patent for a quarter-section of the public lands, which, it was alleged, had been signed by the President, the seal of the United States affixed to it, and duly recorded in the proper book in the General Land Office, and countersigned by the recorder. For this instrument, while in the immediate possession of the Secretary, McBride made demand and was refused, whereupon he filed the petition for mandamus. The court, instead of issuing the alternative writ, proceeded by ordering a rule on the Secretary to show cause why the writ should not issue. A supplemental petition was filed, and Secretary Schurz, in due time, filed his answer, accompanied by certain exhibits, to which the relator replied by taking issue, according to the rules of practice prescribed by that court, on every allegation of the answer.

Upon these pleadings, and the following agreed statement of facts signed by counsel for each party, the case was heard and the rule was discharged:

"Agreed statement of counsel.

"In the Supreme Court of the District of Columbia, this fourteenth day of November, 1879.

"The United States ex rel. Thomas McBride v. Carl Schurz, Secretary of the Department of the Interior.

"At Law. No. 21,200.

"Be it remembered that on the hearing of this cause be-

fore the Supreme Court of the District of Columbia, sitting in general term, on the twenty-eighth day of October, 1879, it was conceded by both parties that all the allegations of the original petition were true, except the one that the premises named in the petition were in 1862 subject to pre-emption filing or homestead entry.

"It was also conceded that the case relating to said premises, set out in the answer of respondent, had been appealed from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, and was pending before the said Secretary at the time of the demand for said patent was made on him, as set forth in the said original petition for relator, and for some days thereafter, and that at the time of said demand, and for some days thereafter, the said patent was, with the papers in said case, as an exhibit in said case, in the office of the Secretary of the Interior, and was not in the office of the Commissioner of the General Land Office.

"It was also conceded that the incorporated town of Grantsville, set forth in the answer of the respondent, was in fact the incorporated city of Grantsville, and that it was incorporated by the territorial legislature of Utah, on the twelfth day of January, 1876, and that said act should be treated as referred to and made a part of this case.

"All other matters in said case stood upon the original and supplemental petition, the answer of the respondent, and the replication thereto. There was no other or further proof or evidence offered by either party.

"One of the rules of this court is as follows:

"33. The joinder in issue may be—

"The plaintiff joins issue upon the defendant's first plea.

"The defendant joins issue upon the plaintiff's replication to the first plea.

"And this form of joinder shall be deemed to be a denial of the substance of the pleading to which it relates, and an issue thereon.

"And thereupon the said court, upon the tenth day of November, 1879, upon the evidence and pleading aforesaid, gave judgment for the said respondent.

"The foregoing facts are stipulated to be a full and

true statement of this case, and made part of the record therein.

"Nov. 14, 1879.

"W. H. SMITH, *Attorney for plaintiff.*

"U. J. BAXTER, *Of counsel for respondent.*

"Whereupon the court orders the said stipulation to be made of record in the case." * * *

Some question was made on the argument in this court as to the effect of the answer as evidence, and the practice in the court of king's bench in England has been referred to as making the return of the writ conclusive or at least evidence of all it states. We are relieved of any difficulty on this point by the stipulation of the parties.

No writ of mandamus, alternative or otherwise, was issued, and there was, therefore, no technical return to such a writ, and in strictness the rule applicable to such a writ does not apply. If, however, it could be held that the answer to the rule to show cause stands in the place of a return to a writ of mandamus, the parties have voluntarily made their own issues and stipulated as to the evidence which shall be considered by the court.

By this stipulation the allegations of the original petition, except one which is specified, are to be taken as true. Certain other facts are then set out. It is then added that all other matters stand upon the original and supplemental petitions, the answer and replication, and that there was no other or further proof offered by either party. As the replication distinctly put in issue every paragraph of the answer, as no evidence was offered in support of the answer, and as the rule of the court is recited which makes the replication in this case a denial of the substance of the pleading to which it relates, we must exclude the supplemental petition and the answer of the respondent as evidence and decide the case on the allegations of the original petition and the facts stipulated in the agreed case.

The petition alleged that McBride, who had the requisite qualification to assert a claim under the pre-emption or homestead laws, settled upon the land covered by the patent in the year 1862, with intent to appropriate it under the laws of the United States; that he erected a dwelling-house, cultivated the land, and has continuously occupied and re-

sided on it ever since. That in May, 1869, he made a homestead entry of the land at the proper land office in Salt Lake City. That he duly presented this claim according to law and the rules of the land department, with such effect that a patent to him for the land was signed by the President on the twenty-sixth of September, 1877, sealed with the seal of the United States, countersigned by the recorder of the General Land Office, and duly recorded by him in the proper record book of that office. That this patent was transmitted by mail to the local land officers at Salt Lake for delivery to the petitioner, and was, while there, demanded by him of those officers, who refused to deliver it. That said patent was afterwards, by order of the Commissioner of the Land Office, returned to that office, and coming into the possession of the Secretary of the Interior on some proceedings by other parties contesting petitioner's right to the land, petitioner again demanded its delivery to him of the Secretary, who also refused. He thereupon filed his petition for the mandamus.

We are met at the threshold of this inquiry by a denial of the authority of the Supreme Court of the District of Columbia to issue a writ of mandamus, as an original process.

The argument is that the jurisdiction of that court over this class of subjects is governed by sec. 760 of the Revised Statutes relating to the District of Columbia. That section enacts that "the Supreme Court shall possess the same power and exercise the same jurisdiction as the circuit courts of the United States." As this court decided in McIntyre v. Wood, 7 Cranch, 505, and McClung v. Silliman, 6 Wheat. 599, that the circuit courts of the United States possessed no such power, the argument would be perfect if no other powers on that subject existed in the Supreme Court of the District than what is conferred by the above section.

But this court, in the case of Kendall v. The United States, held that by the act of February 27, 1801, organizing originally the courts of this District, the clause of that act which declared the laws of Maryland in force at that date, continued in force in that part of the District which had been ceded by that State, invested the circuit court, as

it was then called, with this very power, because it was a common-law jurisdiction, and the common law on that subject was then in force in Maryland. 12 Peters, 618, *et seq.* This proposition has been repeatedly upheld by the court since that time, and up to the date of revision it was no longer an open question that in a proper case the court had authority to issue the writ.

It is now said, however, that this section being enacted as of the first day of December, 1873, defines the jurisdiction of the Supreme Court of the District as governed by the powers of the circuit courts of the United States over the same subject at that date, at which time it is clear these latter courts had no such power; and that as the revision repealed all other laws on the same subject, the act concerning the law of Maryland no longer applied to the case.

This leaves out of the process of reasoning the ninety-second section of the revision, which declares again that "the laws of the State of Maryland, not inconsistent with this title, as the same existed on the twenty-seventh day of July, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the District." Thus the argument is precisely the same as it was in the case of Kendall v. United States, for it was urged there, as here, that as the act creating the court measured its jurisdiction by that of the circuit courts of the United States, which had no such jurisdiction, there could be none in the former; to which the court replied, the provision which continued in force the laws of Maryland.

The revision has merely separated the different sections of the act of February 27, 1801, and placed part of it in section 760 and part of it in section 92. Neither provision is repealed, but we think both of them are retained, with the construction placed on them by this court in Kendall v. United States, and the subsequent cases. But this question would seem to be set at rest by the act of 1877, "to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia." The act amends section 763 of the Revised Statutes of the District, by enacting that "said courts shall have cognizance of all crimes and offenses com-

mitted within said District, and in all cases in law and equity between parties, both or either of which shall be resident or be found within said District, and also of all suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants." 19 U. S. Stat. 253.

We are of opinion that the authority to issue writs of mandamus in cases in which the parties are by the common law entitled to them, is vested in the Supreme Court of the District of Columbia.

We proceed to inquire whether the relator has made such a case.

If the relator was entitled to the possession of the patent as his property, and it was the plain duty of the Secretary to deliver it to him when demanded, then, under all the authorities, and especially the decisions of this court, he is entitled to the remedy he asks. From the case of Marbury v. Madison, 1 Cranch R. 137, down to the present time, such has been the settled doctrine of this court. And though it may be said that the opinion of Chief Justice Marshall in that case was not necessary to the decision made, which was that *this* court had no *original* jurisdiction in that case, the principles of the opinion have been repeatedly recognized and acted upon in this court since, and the case cited with approval in its definition of the circumstances under which persons holding public offices will be compelled to perform certain duties which are merely ministerial. Kendall v. United States, 12 Peters, 618; Kendall v. Stokes, 3 How. 98; Decatur v. Paulding, 14 Peters, 353; Commissioner v. Whiteley, 4 Wall. 534.

The next objection to issuing the writ which we are called to consider is, that the Secretary, in deciding whether he would deliver the patent to McBride or not, was called upon to exercise a judgment and discretion on the case presented to him which were not ministerial, but which were rather judicial in their character, and in regard to which many matters were to be considered—such as the validity of the title conferred by the patent, the circumstances under which it was signed, sealed, and recorded, and the conflicting rights of other parties to the land covered by it. In short, that this execution of the patent concluded nothing,

and the authority of the Secretary and the Commissioner of the General Land Office to deal with the whole subject, including the relator's right to the land, remained unaffected by the patent. Whether this be so or not must depend upon the authority conferred by Congress upon these officers, and the effect of the patent in the stage to which it had come when the demand for its possession was made by McBride.

The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States, and under this provision the sale of the public lands has been placed by statute under the control of the Secretary of the Interior.

To aid him in the performance of this duty, a bureau has been created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them as a special tribunal, Congress has confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen, and this court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring title were as yet *in fieri* before this special tribunal created by Congress for deciding the questions which should arise in the course of these proceedings, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

But we have also held that when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the land has passed from the government, the question of who is the real owner of it is open in the proper courts to all the considerations appropriate to the case. And this is so, whether the United States shall sue to set aside the patent and recover back the title so conveyed, as in the United States v. Stone, 2 Wall. 525, or an individual shall sue to have the title conveyed by the patent, held by the patentee in trust for that individual,

on account of equitable circumstances which entitle him to that relief. Johnson v. Towsley, 13 Wall. 72, and other cases.

In the case before us it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the land in controversy, is not effectual for that purpose for want of delivery. That though signed and sealed and recorded, and sent to the register of the land office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the land department, and that the instrument is invalid as a deed of conveyance for want of delivery to the grantee. If it were conceded that delivery of this patent is essential to its power to transfer title to the grantee, and that such delivery is required as that which is necessary between man and man, it would be a question of some difficulty to decide whether such delivery has taken place in this case. The well-known principle by which the intention of the grantor in a deed to make an act which falls far short of manual delivery, to stand for delivery, when so designed, might well be applied to the act of the Commissioner in transmitting the patent by mail to the local office for the purpose of delivery; while on the other hand it is argued with much force that the instrument never actually passed from the land office or the control of its officers. We do not think the decision of this point necessary to the case before us.

We are of opinion that when, upon the decision of the proper office that the citizen has become entitled to a patent for a portion of the public lands, such a patent is in that office made out and signed by the President, and when the seal of the United States is affixed to the instrument, countersigned by the recorder of the land office, and duly recorded in the record book kept for that purpose, it becomes a solemn public act of the government of the United States, and needs no further delivery or other authentication to make it perfect and valid. That in such case the title to the land passes by matter of record to the grantee, and that delivery, as in case of deeds of private individuals, is not necessary to give effect to the granting clause of the instrument.

The authorities on this subject are numerous, and they are uniform. They have their origin in the decisions of the English courts upon the grants of the crown, evidenced by instruments called there, as here, patents.

Blackstone describes four modes of alienation or transfer of title to real estate, which he calls common assurance; the first of which is by matter *in pais* or deed, the second by matter of record or an assurance transacted only in the king's public courts of record, the third by special custom, and the fourth by devise in a last will or testament.

In the chapter devoted to alienation by deed, he enumerates among the requisites to its validity the act of delivery. Book 2, chap. 20. But in chapter 21, devoted to alienation by matter of record, nothing is said about delivery as necessary to pass the title, and under this head he includes the king's grants. These, he says, are all made matter of public record, and are contained in charters or letters-patent. He then recites the processes by which patents are prepared and perfected, the various officers through whose hands they pass, and the manner of affixing the seal to them, and their final enrollment. They are then perfect grants, and no mention is made of delivery as a prerequisite to their validity. After this they can only be revoked or annulled by *scire facias* or other judicial proceeding. 2 Commentaries, 346. The importance attached to the delivery of the deed in modern conveyancing arises largely from the fact that the deed has taken the place of the ancient livery of seisin in feudal times, when in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investiture of the title to the land. This became gradually diminished in importance until the manual delivery of a piece of the turf, and many other symbolical acts, became sufficient. When all this passed away, and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seisin. Shepherd's Touchstone, 54; Coke upon Littleton, 266 b; Washburn on Real Property, book 3, page 308. Finally, any delivery of the deed, or any act which the party intended to stand for

such delivery, became effectual to pass the title. Church v. Gilman, 15 Wendell, 656; Butler v. Baker, 3 Coke, 26 b; Warren v. Levitt, 11 Foster, N. H. R. 340; Hatch v. Hatch, 9 Mass. R. 307.

But in regard to the transfer of title by matter of record, whether this record were a judgment or decree in a court of justice, as fines and recoveries, or the record made in the proper office (generally in the Court of Chancery by the Lord Chancellor) of the king's grant, called enrollment, no livery of seisin was necessary, nor any delivery of the document sealed with the king's seal; for when this seal was affixed to the instrument and the enrollment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the king. Hence, Mr. Cruise, in his digest of the English Law of Real Property, says: "The king's letters-patent need no delivery; nor his patents under the great seal of the Duchy of Lancaster; for they are sufficiently authenticated and completed by the annexing of the respective seals to them." Title XXXIV., section 1, paragraph 3.

In the case of Marbury v. Madison, 1 Cranch R., to which we have already referred, the court, likening the commission of the justice of the peace, which was signed and sealed by the President and left in the hands of the Secretary of State, to a patent for lands, uses this language:

"By the act passed in 1796, authorizing the sale of lands above the mouth of the Kentucky river (vol. 3, p. 229), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased, and on producing to the Secretary of State the receipt of the treasurer, upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State and recorded in his office. If the Secretary of State *should choose to withhold his patent*, or, the patent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured party no remedy? *It is not believed that any person whatever would attempt to maintain such a proposition.*"

In another part of the opinion it is said: "In all cases of letters-patent, certain solemnities are required by law,

which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign-manual of the President and the seal of the United States are those solemnities."

The same principle is found in the opinion of the court, delivered by Mr. Justice Story, in the case of Green v. Liter, 8 Cranch, 229.

Many decisions of State courts of the highest character to the same effect are cited in the brief of counsel for relator in this case, among which may be mentioned Ex parte Kuhtman, 3 Rich. Eq. R. 257; Downer v. Palmer, 31 Cal. 513. The subject is very fully and ably discussed by Mr. Justice Field, in the case of Leroy v. Jamison, 3 Saw. 369.

It is also said that there was no acceptance of this patent by the grantee, and for that reason it is ineffectual to convey title. It is not necessary to enter into much discussion on this subject, because the acceptance of a deed may be presumed under circumstances far short of what was admitted to exist in this case.

The doctrine on this point is well stated by Attorney-general Crittenden, in the case of Pierre Mutelle, in 1841, as found in 3 Opinions of Attorneys-general, 654, which was a case like the present, in regard to the duty of the Secretary to deliver the patent then lying in the office.

"My opinion," said he, "is that the title to the land *did pass to Pierre Mutelle at the date of the patent to him, though that patent still remains in the land office without any actual tradition of it to any one.* The patent was issued by authority and direction of law; and upon general principles, *where the patentee does not expressly dissent,* his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and in all such cases, the acts required to be done by the claimant and actually done by him in the preparation of his claim for patenting are equivalent to a positive demand of the patent, and amount to an acceptance of it. The patent, in the meaning of the act referred to, *is granted to the patentee from its date, though he may never actually see or receive it,* and is valid and effectual to pass the title to the land.

"All legal muniments of title belong to him who owns the land, * * but as the patent is a recorded evidence of title, always accessible, no material prejudice can result to the true owner from a stranger getting possession of it."

The long pursuit of this claim by McBride, his repeated demand for the patent after it had been perfected, and his persistent effort to obtain possession of it, are ample proof of his acceptance of the grant of which it is the evidence.

It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

We are not prepared to say that if the patent were absolutely void so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

But the distinction between a void and voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the land department, among whom we include the Secretary of the Interior, are confided, as we have already said, the administration of the laws concerning the sale of the public lands. The land in the present case had been surveyed, and the lands in that district generally had been opened to pre-emption, to homestead entry, and to sale under their control. The question whether any particular piece of land belonging to the government was open to sale, to pre-emption, or to homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question is judicial in its character, as also the decision of conflicting claims to the same land by different parties.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the ex-

ercise of that jurisdiction. How can it be said that when their decision of such question is finally made and recorded in the shape of a patent, that instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had land, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously the patent may be voidable, but not absolutely void.

The mode of avoiding it if avoidable is not by arbitrarily withholding it, but by judicial proceeding to set it aside, or correct it if only partly wrong. It was within the province of those officers to sell the land and to decide to whom and for what price it should be sold, and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a patent under the seal of the United States and the signature of the President, that instrument carried with it the title of the United States to the land.

From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceeding their authority in the matter ceases.

It is equally clear that this period is at the latest, precisely when the last act in the series, essential to the transfer of title, has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away. The fact that the evidence of

this transfer of title remains in the possession of the land officers, can not restore the title to the United States, or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title.

What is this final act which closes the transaction?

In the case of Marbury v. Madison, this court was of opinion that when the commission of an officer was signed by the President, and the seal of the United States affixed to it, the commission was complete, and the officer appointed entitled to its possession, so that he could enforce its delivery by the writ of mandamus. In regard to patents for land, it may be somewhat different, and it is not necessary in this case to go quite so far.

But we may well consider that in all nations, as far as we know, where grants of the property of the government, or of the crown, are made by written instruments, provision is made for a record of these instruments in some public government office. Our experience in regard to Mexican, Spanish, and French grants of parts of the public domain purchased by us from those governments, teaches us that such is the uniform law of those countries. We have already shown that under the English law all letters-patent are enrolled, and that this is the last act in the process of issuing a patent which is essential to its validity.

We are safe in saying that every State in the Union has similar provisions in reference to its grants of land, and it has been the effort of most of them to compel public record of all conveyances of land by individuals or corporations.

The acts of Congress provide for the record of all patents for land in an office and in books kept for that purpose. An officer called the recorder is appointed by law to make and to keep these records. This officer is required to record every patent before it is issued and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction—the legally appointed act which completes what Sir William Blackstone calls title by record; and when this is done, the grantee is invested with that title.

We do not say that there may not be rare cases where all this has been done and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If,

for instance, the clerk whom the President is authorized by law to appoint to sign the President's name to the patent, should do so when he has been forbidden by the President, or if, by some mere clerical mistake, the intention of the officer performing an essential part in the execution of the patent has been frustrated. It is not necessary to decide on all the hypothetical cases that could be imagined.

But we are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent.

No further authority to consider the patentee's case remains in the Land Office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus.

It is not always that the ill consequences of a principle should control a court in deciding what the established law on a particular subject is, and in the delicate matter of controlling the action of a high officer of the executive branch of the Government it would certainly not alone be sufficient to justify judicial interposition. But it may tend to reconcile us to such action as we feel forced to take, under settled doctrines of the courts, to see that any other course would lead to irremediable injustice.

If the relator in this case can not obtain his patent he is wholly without remedy. He can not sue the United States, in whom is the title in the absence of the patent, for the United States can be sued in no other court than the Court of Claims, and we have decided that that court has no jurisdiction in such case. Bonner v. The United States, 9 Wall. 156. There is no one else to sue, for the title is either in the relator or the United States. It may be many years before the city of Grantville, the party now claiming against relator, will get a patent, and it may never do so.

The relator is therefore utterly without remedy, if the

land be rightfully his, until he can obtain possession of this evidence of his title.

On the other hand, when he obtains this possession, if there be any equitable reason why, as against the government, he should not have it; if it has been issued without authority of law, or by mistake of facts, or by fraud of the grantee; the United States can, by a bill in chancery, have a decree annulling the patent, or possibly a writ of *scire facias*. If another party (as the city of Grantville) is, for any of the reasons cognizable in a court of equity, entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession, or perhaps before. So that it is plain that by non-action of the land department the legal rights of the parties may remain indefinitely undecided, and the rights of the relator seriously embarrassed or totally defeated, while the delivery of the patent, under the writ of mandamus, opens to all the parties the portals of the courts, where their rights can be judicially determined.

We are of opinion that the relator in the case, as presented to us, is entitled to the possession of the patent which he demanded; that the writ of mandamus by the Supreme Court of the District of Columbia is the appropriate remedy to enforce that right, and the judgment of that court is reversed, and the case remanded, with instructions to issue the writ.

ADDENDA.

No. 1. LIMESTONE.

Limestone deposits do not, as minerals, except land from railroad grants in terms similar to the one to the Southern Pacific Railroad prior to 1872. Lands in California containing limestone, and useless for agriculture, can be purchased only under the timber and stone act of June 3, 1878.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., August 5, 1880.

Register and Receiver, Visalia, California.

GENTLEMEN: I have examined the papers in the matter of the application of Elias Jacob to enter, under the laws providing for the sale of mineral lands, lot 37 being partly within the N. E. ¼ section 35, township 17 south, of range 27 east, M. D. M., in Tulare county, California. The claim is known as the "Kaweah Limestone Ledge Mine."

The report of P. Y. Baker, U. S. Deputy Mineral Surveyor, dated March 12, 1879, is to the effect that the limestone is of good quality, and the land more valuable for its limestone than for agricultural purposes.

The improvements: One excavation from which stone has been removed; about one hundred cubic feet of stone on the dump; open cuts, running to the lode; roadway to the dump; three lime-kilns in good order; one dwelling-house, and shed for horses. The value of said improvements he estimates to exceed $1000. The claim was located 1500 by 600 feet, February 18, 1879, by Elias Jacob, and recorded February 24, 1879, in Recorder's office of Tulare county.

Application for patent was filed April 18, 1879. Publication of notice in the Tulare Weekly Times from April 19 to the twenty-first of June, 1879, the legal period; posting on the claim and in the Register's office continued for the same time.

July 28, 1879, the Clerk of the Tulare County and District Courts certified that no suits or action involving said claim was pending or had been theretofore brought; and

July 30, 1879, Mr. Jacob applied to make entry, and tendered the purchase money.

On the eighteenth of June, 1879, James Newton filed adverse claim against Jacob's application, basing his allegation of ownership on his pre-emption claim involved in the case of said Newton v. The Southern Pacific Railroad Company, and pending decision in this department. Newton, in said adverse claim, concedes the value of the land to be its limestone, which he says is inexhaustible. He failed to bring suit within the statutory period, and was entitled to no stay of proceedings upon his claim as filed: 1. Because a homestead is not the subject of an adverse claim; and, 2. If it had been, his allegations of right were wholly imperfect.

July 31, 1879, supplemental objections were filed by Newton's attorney. In some points they are in direct contradiction to Newton's former affidavit, and in others unimportant, requiring no specific attention. The Honorable Secretary of the Interior finally rejected the settlement claim of Newton, February 5, 1880, and his right need be no further discussed.

A protest, dated August 1, 1879, was filed by D. K. Zumwalt, attorney for the Southern Pacific Railroad Company, setting forth that limestone is not usually classed as mineral, and that at the time of the grant to said railroad company only the precious metals were dealt with by the government as minerals in its disposition of lands, and was not intended to be excepted from the grant to said company, and that no notice had been served on said company or its said attorney.

The company was only entitled to the notice given by publication as aforesaid.

August 1, 1879, you transmitted the papers to this office, with the statement that in your opinion the entry of Jacob must be allowed, but in view of said protest you deemed it proper to refer the matter to this office. The land in question is within the limits of the grant to the Southern Pacific Railroad Company, whose right, in the absence of any objection, would attach thereto October 3, 1872.

The grant was made to said company, section 18, act July 27, 1866 (14 Stats. 292), subject to the same conditions as

the grant to the Atlantic and Pacific Railroad Company. The grant to the last named company (section 3 of said act) was of "every alternate section of public land, *not mineral*, designated by odd numbers," etc.

Was land of this character mineral, within the meaning of the law?

The act of Congress of July 26, 1866 (14 Stats. 251), provided that "the mineral lands of the public domain * * * are hereby declared to be free and open to exploration and occupation." What lands were designated by the act as mineral, appears in sections 2 and 10, as "a vein or lode of quartz, or other rock in place, bearing, *gold, silver, cinnabar* or *copper*. Section 12 of the act of July 9, 1870, providing for the entry and patenting of placer claims, included "all forms of deposit, excepting veins of quartz or other rock in place." The act of May 10, 1872, provided for the survey, entry, and patenting of "mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, *or other valuable deposits*." By circular issued to Surveyors-general and Local Land Officers, July 15, 1873, it was held, in effect, that all valuable mineral deposits were subject to entry under the act of May 10, 1872.

I am not aware, however, that application has ever been made under the act of 1866, for a patent on a limestone ledge; but, on the contrary, where the land was agricultural, and not used for manufacturing purposes, existence of limestone constituted no objection to its entry as agricultural land.

The act making the grant to the railroad company authorized "said corporation to take from the public lands adjacent to the line of said road, material of earth, stone, timber, and so forth;" and only reserved from the otherwise unappropriated land granted such as was mineral in character.

I am clearly of the opinion that the act did not except from the grant as mineral such lands as were simply valuable for its deposit of limestone, for such lands under the laws then in force were not subject to disposal as mineral; but, as before stated, were disposed of as agricultural when used for agricultural purposes.

Aside from these considerations, I find upon the statute

books an act of Congress providing a specific mode for the acquisition of title to lands valuable chiefly for stone. This act, which was approved June 3, 1878, provides that lands of such character in the State of California shall be sold to qualified applicants at the rate of $2.50 per acre.

I entertain grave doubts that limestone should be classed as a mineral, or disposed of as *mineral land* under any of the laws of the United States. If such lands are to be classed as mineral, they must necessarily be reserved from disposal under the laws providing for settlement rights, and in that manner parties who are now occupying lands for agricultural purposes, and who have, perhaps, made extensive improvements, would be prevented from acquiring title under the pre-emption, homestead, or other agricultural land laws.

The act of June, 1878, may be considered a congressional interpretation of the mining laws then in force, to the extent of holding that they did not provide a mode for the disposal of land valuable chiefly for stone.

This office has decided but one regularly presented case involving the question as to whether land valuable for limestone was subject to entry under the mining laws. Such decision was undoubtedly based upon the opinion of Attorney-general Williams, stated in his communication of August 31, 1872, to the Honorable Secretary of the Interior.

In said opinion it is held that diamonds are "valuable mineral deposits," and the land having such a deposit is subject to entry under sections 1 and 6 of the act of May 10, 1872 (sections 2319 and 2325, Revised Statutes).

The Honorable Attorney-general states: "Public lands, for the purpose of sale, are divided into agricultural and mineral lands. The minimum price of the former is $1.25, and of the latter $5 per acre; mineral lands, exclusive of their mineral deposits, are generally worth little or nothing. Prior to the act of July 26, 1866 (14 Statutes, 257), it was customary for persons to take those deposits without respect to the right of the United States. Congress then provided a way in which persons locating lands for mining purposes might acquire title, and other acts have since been passed promotive of the same end. I think these acts ought to be most liberally construed, so as to facilitate the

sale of such lands; for in that way, and not otherwise, can they be made to contribute something to the revenues of the government, and controversy litigation in mining localities to a great extent prevented."

Two principal objects are, under the law and the ruling referred to, accomplished: First, the classification of the land, either as mineral or agricultural; and, second, if mineral, the sale of the same at an increased price. Land which prior to July 26, 1866, could only be sold at a regular offering, could now be disposed of by the government and a valid title conferred upon the purchaser.

But in carrying out the idea of classification, the moment land valuable for certain character of stone is decided to contain "valuable mineral deposits," it is no longer, unless the mineral is useless on account of the expense and labor in procuring it, subject to entry under the various agricultural land laws, and is excluded from all grants of land which make an exception of mineral lands.

In my opinion lands valuable for limestone do not necessarily fall within the classification of lands as mineral under the opinion of the Honorable Attorney-general. And in view of the fact, that since said opinion was rendered, Congress has by legislation provided a special mode for the sale of such lands, I am not inclined to treat them as mineral.

In treating of the classification of land into mineral and agricultural, I am not strictly confined to the geological terms and definitions. Lands which are principally valuable for agricultural pursuits, may contain mineral deposits, as the term mineral is scientifically applied. Under the United States mining laws, the deposit should be *a valuable* mineral, and in the administration of the law, I am often called upon to decide in a case between agricultural claimants and mineral affiants, whether the land is *more valuable* for agricultural than for mineral purposes.

The location of Jacob was made after the passage of the act of June, 1878, and, if admissible at all, the entry should have been made under that act; but the land is not subject to disposal under that act, for the reason that the right of the railroad company attached to said land under its grant, there being no valid adverse claim to the same at the date of withdrawal, or on the third of October, 1872.

The application of Jacob is refused, and the land is awarded to the railroad company. Notify parties in interest of this action, allow the usual right of appeal, and report the action taken.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 2. GYPSUM.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 15, 1880.

Z. T. DUVALL, Esq., *Deadwood, Dakota.*

SIR: In reply to your communication dated eleventh ultimo, you are informed that, in my opinion, lands of the public domain containing deposits of gypsum, which is of similar formation to limestone, are not subject to disposal under the mining act. Limestone underlies a great portion of the territory west of the Missouri river, and to reserve such lands from sale as mineral would entirely prevent its development for agricultural purposes.

The term "mineral," in its most comprehensive sense, includes all inorganic substances having a definite chemical composition, and so applied in the construction of section 2318, Revised Statutes, would subject all of the public domain to sale under the mining act.

A more reasonable construction of said section, I conclude, will hold it to embrace only such lands as contain valuable deposits of metals and such other substances which give the same a special value greater than that of land containing limestone deposits in any of its forms.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 3.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 14, 1880.

ALBERT JOHNSON, *U. S. Surveyor-general, Denver, Colorado.*

SIR: Section 2325, U. S. Revised Statutes, requires you to certify that $500 worth of labor has been expended or improvements made upon a mining claim by the applicant for patent or his grantors.

In reply to your letter of the thirteenth ultimo, I have to state that in my opinion all improvements made upon a mining claim having a direct relation to the development thereof, may be taken into consideration by you as a basis for your certificate.

Any building, machinery, roadway, or other improvements used in connection with and essential to the practical development of the surveyed claim, will enter into and form a part of the expenditures for improvements to which you are required to certify. Necessarily, however, improvements of the character indicated must be associated with actual excavations, such as cuts, tunnels, shafts, etc., so as to clearly show that they are intended for use in connection with the claims under consideration. Deputies should make full report of the facts in each case.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

No. 4. CIRCULAR.

"N." DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., December 17, 1880.

Registers and Receivers, U. S. District Land Offices.

GENTLEMEN: In every case where it becomes necessary under the law and existing instructions of this office to require a hearing to be held and testimony taken for the purpose of ascertaining the mineral or agricultural character of land, you are directed to cause such hearing to be held before a duly qualified officer whose office is located nearest the land in dispute, the distance to be computed by ordinary routes of travel. Whenever the local land office comes within this rule, the hearing will be held before the Register and Receiver.

It is intended to cause these hearings to be held, so far as practicable, in such manner as to afford the least inconvenience to persons interested. Should it appear, therefore, by written stipulation of all the parties that this purpose will best be subserved by the designation of any particular officer authorized to administer oaths within the land district in which the land in controversy is situated, the instructions herein may be departed from in accordance

with such stipulation. It may also happen that the officer who would otherwise be selected is an interested party, or some other good reason may appear why his designation would be improper, and in such case you will direct the hearing to be held before the next nearest officer.

These instructions are in accordance with section 2335, U. S. Revised Statutes, and the rule suggested by the Hon. Secretary of the Interior, February 16, 1878.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

FORMS.

The forms for "Application for Patent" and "Protest and Adverse Claim" are not prescribed as proper in *every* case. In fact, no form can be prepared that will answer that purpose; at best they only suggest what should appear upon the face of the papers.

These forms have been arranged in about the order in which they are commonly used.

FORM A.

No. 336. Notice of Location of a Quartz Claim.

[BLANK PUBLISHED.]

Notice is hereby given to all whom it may concern, that ....., citizens of the United States, over the age of twenty-one years, having discovered a vein or lode of quartz, or rock in place, bearing ....., within the limits of the claim hereby located, have this day under and in accordance with the Revised Statutes of the United States, chap. 6, tit. 32, located .... linear feet of this vein or lode, with surface ground .... feet in width, situated in . ... Mining District, County of ....., State of ....., and known as the ..... Quartz Mining Claim, and extending .... feet .... to .... and .... feet .... to ... . from this notice at the discovery or prospect shaft, the exterior boundaries of this claim being distinctly marked by reference to some natural object or permanent monuments, and more particularly described as follows, to wit:..... and we intend to hold and work said claim as provided by the local customs and rules of miners, and the Mining Statutes of the United States.

....

....

Dated on the ground, the .... day of ....., 188..

Discovered ....., 188.. .....Locator.

Located ....., 188.. Recorded ....., 188..

Attest:

.....

.....

NOTE.—Describe the claim as accurately as possible (by courses and distances) with reference to some natural object or permanent monument, and mark the boundaries by suitable monuments; if a placer claim is located on surveyed land, describe the legal subdivision.

Record of location notices, in absence of a district recorder, should be made with the proper recorder of deeds for the county wherein the claim is situated. It is advisable to have these notices attested by at least two witnesses, for locators can not be too careful about their evidence. In relocations to increase width of surface ground under the local law, or to more particularly identify or describe the claim, use the above form, but state after the description that it is a relocation, and in addition where the original location is recorded, in order that the title may revert back to the original discovery. In locations of abandoned mines, the fact that it is such a location should be stated, and the affidavits of two or more respectable parties that such mine was abandoned and subject to relocation should be recorded with the location notice.

No quartz claim can be legally located until a vein or lode has been first discovered. This should be done by sinking a prospect or discovery shaft. The exterior boundaries of the claim must be distinctly marked by permanent stakes, or monuments placed at the corners of the claim. The notice should be posted at the discovery shaft and a copy of the same recorded within twenty days after the location. In all cases where practicable, the location should be made under a survey by a qualified deputy surveyor.

FORM B.

No. 337. Notice of Location of a Placer Claim.

[BLANK PUBLISHED.]

Notice is hereby given to all whom it may concern, that ....., citizens of the United States, over the age of twenty-one years, have this day located under the Revised Statutes of the United States, chap. 6, tit., 32, the following described placer mining ground, viz.:*..... situated in ..... Mining District, ... County, State of..... This claim shall be known as the ..... Placer Mining Claim, and we intend to work the same in accordance with the local customs and rules of miners in said mining district.

....

....

Dated on the ground this .... day of ....., 188.

A person or association of persons claiming under regular location a lode or quartz mine, or a placer claim, upon *unsurveyed* land, and desiring to obtain title thereto from the United States, should first make application to the United States' Surveyor-general for the State or Territory within which the claim is located for a survey thereof, using Form C.

FORM C.

No. 356. Application to U. S. Surveyor-general for Survey of Mining Claim.

[BLANK PUBLISHED.]

.....

U. S. Surveyor-general for.....

SIR: In compliance with the provisions of the Revised Statutes of the United States, chap. 6, tit. 32, and instruc-

* NOTE.—If on surveyed land, describe the legal subdivision. If upon unsurveyed land describe as accurately as possible by course and distance.

tions issued thereunder, ... herewith make application for an official survey of the mining claim known as the ..... Mine, claimed by ....., located in ..... Mining District, in the County of ....., Township No. ...., Range No. ...., ...Base and Meridian, in the State of ....., mentioned and described in the annexed record of location, and ..... request that you will send to ..... address an estimate of the amount to be deposited for the work to be done in your office; and after such deposit shall have been made, you will cause the said mining claim to be surveyed by ....., U. S. Deputy Mineral Surveyor, and will make a plat thereof, indorsed with your approval, designating the number and description of the location. and the value of the labor and improvements made by the locator or his grantees on said mining claim; and that you will transmit duplicate copies of said plat to applicant , with a certified copy of the field notes of survey of said mining claim.

The expenses of office work ..... herewith tendered, and request that prompt action be taken therein.

..... Claimant.

P. O. Address,.....

..... County,

.....

NOTE.—If the applicant is not in actual possession of the ground, an affidavit stating how he was dispossessed, when he was last in possession, and what adverse claims there are, should be filed. This affidavit should state all the material facts and circumstances.

The Surveyor-general will furnish the applicant with an estimate of the expenses for the office work, covering the items set forth in Form D; and the required deposit having been made, will direct a United States deputy mineral surveyor to make the survey.

FORM D.

Estimate of U. S. Surveyor-general for Office Work for Mining Claim.

U. S. SURVEYOR-GENERAL'S OFFICE,
SAN FRANCISCO, ..., 18..

.....

.....

..... County, California:

....:—I have received your application, dated ....., 18.., made under the provisions of Chapter Six Revised Statutes of the United States, for a survey of the mining claim known as the ..... mine, claimed by ....., located in ..... mining district, in the county of ....., township No. ...., range No. ...., ... base and meridian, in the State of California; also for an estimate of the expense of the office work required to be done in this office.

In reply, I herewith furnish an estimate of the amount to be paid for such office work, viz.:

Stationery.....	$.....
Examination of the original field-notes	.....
Protraction of the original plat	.....
Making duplicate and triplicate plats for claimant ,	.....
Transcription of the original field-notes for claimant ,.....	.....
Preparing diagrams for the general and local land offices.....	.....
.....	.....
Total.....	.....

The said amount must be deposited with the U. S. Assistant Treasurer in San Francisco, and his certificate, in triplicate, taken therefor, and sent to this office: one to be transmitted to the Commissioner of the General Land Office, and one to the Treasurer of the United States, and the other to be forwarded to you.

Upon the filing of said certificate, in duplicate, in this office, I will at once authorize the survey of said mining claim by a United States deputy mineral surveyor.

After the survey and office work have been completed, I will transmit to your address two certified plats of said mining claim, and a certified transcript of the field-notes for your use. Very respectfully,

.....

U. S. Surveyor-general for California.

FORM E.

U. S. SURVEYOR-GENERAL'S OFFICE,

....., 18..

....., Esq., U. S. Deputy Mineral Surveyor,

.....

..... County.

SIR: Having received an application from ....., under the provisions of an act of Congress, approved May 10, 1872, entitled "An act to promote the development of the mining resources of the United States," for a survey of the ..... mining claim, known as the ..... mine, claimed by ....., in the ..... mining district, county of ....., township No. ...., range No. ...., ... base and meridian, in the State of, ... I hereby deputize and appoint you to execute the said survey.

You will make said survey so as to define correctly the *locus* of the ground described in the annexed record of location, and according to the monuments therein referred to.

You will make your survey in strict conformity to the

law and special instructions to deputy mineral surveyors from this office.

You will make full report on all matters connected therewith, the value of the improvements, work and labor done on said claim, in the currency of the United States, the character of the vein exposed, and its connection with some established monuments of public surveys.

You will transmit to this office, without unnecessary delay, your field-notes of survey, your final oath, the preliminary and final oaths of your assistants, your report, a diagram of said mine, and the affidavits of two disinterested witnesses that to the best of their knowledge and belief, from their acquaintance with said mine, the value of the labor and improvements thereon is not less than five hundred dollars.

The United States will not be responsible for the payment of your services; you will therefore make satisfactory arrangements with the claimants before proceeding with your survey. Very respectfully,

.....

U. S. Surveyor-general for .....

It is sometimes necessary to use the following:

FORM F.

Certificate of Identity of Claim.

Territory of Utah, County of .....

..... and ....., of lawful age, each for himself and not one for the other, being first duly sworn according to law, deposes and says that he is a citizen of the United States, that he is well acquainted with the ..... mining claim, situated in .... mining district, county and territory aforesaid, for which .....made application for patent under the provisions of an act of Congress, approved May 10, 1872; that he is not interested in the aforesaid mining claim, either directly or indirectly; that he was present on the .... day of . ...., A. D. 188.., on the ground of said mining claim; and that the survey of said mining claim, made on that date, by ....., surveyor, embraces the identical ground originally claimed by its locators; and, further, that the initial point of discovery of said lode or mining claim, from which said survey has been made by the said surveyor, is the same place where the notice of said lode or mining claim originally was posted.

....

.....

Subscribed and sworn to before me this....day of....., A. D. 188.., and I hereby certify that I consider the above deponents credible and reliable witnessess.

After the survey has been duly made, the field-notes of survey and plat thereof returned, and the whole approved by the Surveyor-general, the party may then make application to the register and receiver for the land district within which the claim is located, for a patent, using

FORM G.

No. 339. Application for Patent.

[BLANK PUBLISHED.]

.....of....., County of....., ss.

Application for patent for the.....mining claim.

To the Register and Receiver of the United States land office, at .....

.....being duly sworn, according to law, deposes and says, that in virtue of a compliance with the mining rules, regulations, and customs by himself, the said ...., and his co-claimants, ..., applicants for patent herein, ha.. become the owner..of, and .... in the actual, quiet, and undisturbed possession of ..... linear feet of the ..... vein, lode, or deposit bearing....., together with surface ground ..... feet in width, for the convenient working thereof, as allowed by local rules and customs of miners; said mineral claim, vein, lode, or deposit and surface ground being situated in the ..... mining district, county of ....., and ..... of ....., and being more particularly set forth and described in the official field-notes of survey thereof, hereto attached, dated .... day of ....., A. D. 18.., and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of himself (and his said co-claimants hereinbefore named) to said mining claim, vein, lode, or deposit and surface ground, so surveyed and platted, are substantially as follows, to wit: (Give full description of claim, from whom and the manner in which title was derived.) Which will more fully appear by reference to the copy of the original record of location, heretofore furnished, and the abstract of title hereto attached and made a part of this affidavit; the value of the labor done and the improvements made upon said ..... claim, by himself and his grantors, being equal to the sum of five hundred dollars, and said improvements consist of (describe in detail). In consideration of which facts, and in conformity with the provisions of chapter six, of title thirty-two of the Revised Statutes of the United States, application is hereby made for and in behalf of said ..... for a patent from the Government of the United States for the said ..... mining claim, vein, lode, deposit, and the surface ground so officially surveyed and platted.

....

Subscribed and sworn to before me this....day of....., A. D. 18.., and I hereby certify that I consider the above deponent a credible and reliable person, and that the foregoing affidavit, to which was attached the field-notes of survey of the ... .. mining claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

.....[SEAL.]

.....

[The above is slightly changed in applying to placer mines.]

NOTE.—Under the provisions of section one, of the act of Congress of January 22, 1880, this application may be made by an agent, when the claimant for patent is not a resident of or within the land district.

The applicant should immediately cause to be posted, in a conspicuous place upon the mining claim, the following notice:

FORM H.

No. 358. Notice of Application for a United States Patent.

[BLANK PUBLISHED.]

Notice is hereby given that in pursuance of the act of Congress, approved May 10, 1872, "To promote the development of the mining resources of the United States," ..... and ...., claiming ..... linear feet of the ....vein, lode, or mineral deposit, bearing....., with surface ground ..... feet in width, lying, being, and situate within the ..... mining district, county of ....., and ..... of ....., has made application to the United States for a patent for the said mining claim, which is more fully described as to metes and bounds by the official plat, herewith posted, and by the field-notes of survey thereof, now filed in the office of the register of the district of lands, subject to sale at ....., which field-notes of survey described the boundaries and extent of said claim on the surface, with magnetic variation at ..... east, as follows, to wit:..... The said mining claim being of record in the office of the recorder of ..... at ....., in the county and ..... aforesaid, the presumed general course or direction of the said ..... vein, lode, or mineral deposit being shown upon the plat posted herewith, as near as can be determined from present developments, this claim being for ..... linear feet thereof, together with the surface ground shown from the official plat posted herewith, the said vein, lode, and mining premises hereby sought to be patented, being bounded as follows, to wit: ..... The said claim being designated as lot number .... in the official plat posted herewith.

Any and all persons claiming adversely the mining ground, vein, lode, promises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that unless their adverse claims are duly filed, as according to law and the regulations thereunder, within sixty days from the date hereof, with the register of the United States land office at ....., in the .... . of ....., they will be barred, in virtue of the provisions of said statute.

.....
.....
.....

Dated on the ground, this .... day of ....., 188..

Witnesses:

.....
.....

At the time of filing the application for patent the claimant should also introduce the proof indicated in forms I, K, L, M, and N. Also an abstract of title, which must show the possessory title to be in the applicant. This abstract should contain memoranda of all the deeds and incumbrances appearing of record in the office of the Recorder of the Mining District or County as the case may be, and must be certified by such Recorder to be a correct abstract. Where there have been no transfers, a certificate to that effect by the Recorder attached to the certified copy of the certificate of location will be required.

FORM I.

No. 340. Proof of Posting Notice and Diagram on the Claim.

[BLANK PUBLISHED.]

..... of ..... County of ..... ss.

..... and ..... each for himself, and not one for the other, being first duly sworn according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and was present on the ..... day of ..... 188.., when a plat representing the ..... and certified to as correct by the United States Surveyor-General of ..... and designated by him as Lot No. ..... together with a notice of the intention of ..... and ..... to apply for a patent for the Mining Claim and premises so platted, was posted in a conspicuous place upon said Mining Claim, to wit, upon ..... where the same could be easily seen and examined; the notice so conspicuously posted upon said claim being in words and figures as follows, to wit:

Notice of the application of ..... and .... for a United States patent.

"Notice is hereby given that in pursuance of Chapter Six of Title Thirty-two of the Revised Statutes of the

United States," ..... and ..... claiming ..... linear feet of the ..... vein, lode, or mineral deposit, bearing ..... with surface ground, ... feet in width, lying and being situated within the ..... Mining District, County of ....., and ..... of ..... ha.. made application to the United States for a patent for the said Mining Claim, which is more fully described as to metes and bounds by the official plat herewith posted and by the field notes of survey thereof, now filed in the office of the Register of the District of Lands, subject to sale at ..... which field notes of survey describe the boundaries and extent of said claim on the surface, with magnetic variation at ..... East, as follows, to wit:

.... the said Mining Claim being of record in the office of the Recorder of..... at ..... in the County and ..... aforesaid, the presumed general course or direction of the said ..... vein, lode, or mineral deposit being shown upon the plat posted herewith, as near as can be determined from present developments, this claim being for ..... linear feet thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode, and mining premises hereby sought to be patented, being bounded as follows, to wit:

..... the said claim being designated as Lot No. ..... in the official plat posted herewith.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that unless their adverse claims are duly filed as according to law and the regulations thereunder, within sixty days from the date hereof, with the Register of the United States Land office at ..... in the ..... of ..... they will be barred, in virtue of the provisions of said statute.

.....

Dated on the ground, this ..... day of ..... 188..

Witness: .....

.....

Subscribed and sworn to before me this ..... day of ..... 188..and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit and notice were read by each of them before their signatures were affixed thereto and the oath made by them.

.....

.....

NOTE.—The notice to be posted on the claim with the plat, is given in the above form.

FORM K.

No. 345. Affidavit of Five Hundred Dollars Improvements.

[BLANK PUBLISHED.]

..... of ..... County of ..... ss.

..... and ..... of lawful age, being first duly sworn according to law, depose and say that they are acquainted with the ..... mining claim in ..... mining district, county and ..... aforesaid, for which ..... has made application for patent under the provisions of Chapter Six of Title Thirty-two Revised Statutes of the United States, and that the labor done and the improvements made thereon by the applicant and his grantors exceed five hundred dollars in value, and said improvements consist of .....

.....

.....

Subscribed and sworn to before me, this ..... day of ..... A. D. 188..

.....

FORM L.

No. 338. Proof of Labor.

[BLANK PUBLISHED.]

.....of....., County of....., ss.

Before me the subscriber personally appeared ....., who, being duly sworn, says that at least.....dollars worth of labor or improvements were performed or made upon....., situated in.....mining district, ... County .....of..... , during the year ending....., 18 . Such expenditure was made by or at the expense of..... , owners of said claim, for the purpose of holding said claim.

..... (Signature.)

FORM M.

No. 348. Affidavit of Citizenship.

[BLANK PUBLISHED.]

.....of....., County of....., ss.

....., being first duly sworn according to law, deposes and says, that he is the applicant for patent for..... mining claim, situated in.....mining district, County of .....; that he is a na..... citizen of the United States, born in....., County of....., State of....., in the year 18.., and is now a resident of.....

Subscribed and sworn to before me, this ..... day of ....., A. D. 188..

.....

.....

NOTE.—If the applicant is a naturalized citizen, or has declared his intention to become a citizen, he should show in his affidavit where, when, and before what court he was naturalized, or his declaration was made.

FORM N.

No. 343. Agreement of Publisher.

[BLANK PUBLISHED.]

The undersigned, publisher and proprietor of the....., a.....newspaper, published at....., County of ....., and.....of....., do hereby agree to publish a notice, dated U. S. Land Office, ..., required by the provisions of chapter six, of title thirty-two, Revised Statutes of the United States, the intention of ..... to apply for a patent for his claim on the .....lode, situated in..... mining district, county of....., of....., and to hold the said..... alone responsible for the amount due for publishing the same. And it is hereby expressly stipulated and agreed that no claim shall be made against the government of the United States, or its officers or agents, for such publication.

Witness my hand and seal this .....day of ..... 188..

.....

Witness.....

At the same time may be appropriately filed, as the case may require, either of Forms O, P, Q, or R.

FORM O.

No. 350. Power of Attorney.

[BLANK PUBLISHED.]

Know all men by these presents, that we, ...and ..... , do hereby constitute and appoint..... as our attorney in fact, for us and in our names to make application to the United States for the entry and purchase of certain government lands, in.....mining district, ... county, ...of ....., known as the ..... mining claim and premises; and to have the same surveyed, and to take any and all steps that may be necessary to procure from the government of the United States a patent to the said lands and premises, granting the same to us. And to do all other acts appertaining to the said survey and entry aforesaid as we ourselves could do by our own act and in our own proper person.

In witness whereof, we have hereunto set our hands and affixed our seals the.....day of....., A. D.18...

.....

.....

.....of....., County of....., ss.

On this.....day of....., A. D. one thousand eight hundred and....., before me, ..., a notary public in and for the .. ... county of ....., personally appeared ....., known to me to be the same person whose name.. subscribed to the foregoing instrument, and acknowledged to me that.....executed the same.

In witness whereof, I have hereunto set my hand, and affixed my official seal, at my office, the day and [SEAL] year in this certificate first above written.

.....,
Notary Public.

FORM P.

No. 347. Proof of Ownership and Possession in Case of Loss or Absence of Mining Records.

[BLANK PUBLISHED.]

..... of ..... County of ....., ss.

..... and ..... each for himself, and not one for the other, being first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and a resident of ....., county ....., and has resided in ..... mining district, wherein the ..... mine is situated, since ..... day of ....., 18... That since said date he has been acquainted with the ..... mine, and with the possessors and workers thereof. That said mine was located and has been possessed and worked in accordance with the customs and usages of miners in said district, and in conformity with the rules and regulations governing the location, holding, and working of mining claims, in force and observed in the ..... of ..... That there are no written records known to deponent existing in said mining district. That affiant is credibly informed and believes that the ..... mine was located in the year 18.., and that if any record was made of said location, and of the names of the locators, the same has not been in existence for a long number of years past, and that by reason thereof the names of locators can not now be ascertained, and no abstract of title from locators to the present owner can be made. That the possession of applicant and his predecessors in interest of said ..... mine has been actual, notorious, and continuous, to the positive knowledge of deponent, since his residence in said mining district, and that such possession has been perfected

and maintained in conformity with mining usages and customs, and had been acquiesced in and respected by the miners of said district. That applicant's right to the said ..... mine is not in litigation within the knowledge of affiant, and that no action or actions have been commenced affecting the right to said mine since his acquaintance therewith (and that the time for the commencement thereof, as required to be instituted under the provisions of the Statute of Limitations of the ..... of ..... has long since elapsed). That applicant and his predecessors in interest have expended in the improvement, development, and working of said mine a sum of money exceeding ..... dollars, as follows, to wit:.....

Subscribed and sworn to before me, this ..... day of ....., A. D. 18.., and I certify that the aforenamed ..... and ..... are credible and respectable persons, to whose affidavits full faith and credit should be given.

[SEAL.] .....
.....
.....

NOTE.—This should be sworn to by at least two respectable persons, and by the applicant for patent.

FORM Q.

No. 359. Non-Mineral Affidavit. (To be used in case of a mill-site.)

[BLANK PUBLISHED.]

..... of ....., County of....., ss.

.... and ....., of said county and State, being first duly sworn, each for himself, deposes and says, that he is well acquainted with ..... claim, situated in ..... mining district, county of ... .., and ..... of ..... claimed by ....., applicant for United States patent therefor; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of such land, in his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for minerals during any part of the year by any person or

persons; that said land is essentially non-mineral land, and that he has no interest whatever in said .....

.....

Subscribed and sworn to before me, this ..... day of ....., 18..; and I hereby certify that the foregoing affidavit was read to the said ..... previous to his name being subscribed thereto; and that deponent is a respectable person, to whose affidavit full faith and credit should be given.

.....

.....

FORM R.

No. 353. Proof that no Known Veins Exist in a Placer Mining Claim.

[BLANK PUBLISHED.]

.....of....., County of....., ss.

..... and....., of the said county and ....., being first duly sworn, each for himself, deposes and says, that he is well acquainted with the..... placer mining claim, embracing....., situated in the.....mining district, in the county of....., and.....of....., owned and worked by.....applicant for United States patent; that for many years he has resided near, and often been upon the said mining premises, and that no known vein or veins of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, exist on said mining claim, or on any part thereof, so far as he knows, and he verily believes that none exist thereon.

Subscribed and sworn to before me, this.....day of ....., A. D. 18 .

.....

NOTE.—In case any known mines exist within the exterior boundaries of the placer claim, the names of such known veins should be given, to be sworn to by the applicant and one or more other persons.

Directly after the filing of the application for patent, with accompanying proof, the Register of the Land Office will designate a newspaper, as published nearest the land sought to be patented, to publish the following notice for sixty days:

FORM S.

No. 355. Application for a Patent.

[BLANK PUBLISHED.]

U. S. Land Office....., 188 .

Notice is hereby given that....., whose postoffice address is....., has this day filed his application for a patent for.....linear feet of the.....mine or vein bearing....., with surface ground.....feet in width, situated, in.....

mining district, county of.....and.....of.....and designated by the field notes and official plat on file in this office as lot number....., in township....., range..... of ....meridian....., said lot number.....being as follows, to wit:

Beginning.....

At the expiration of the period of legal publication of notice of application, the claimant should file with the land officers the proofs indicated by forms T, U, V.

FORM T.

No. 344. Proof of Publication.

....., County of ....., ss.

..... being duly sworn, deposes and says, that he is the..... of the....., a newspaper published in ....., in..... county, in the.....

That the notice,.....of which a copy is hereto attached, was first published in said newspaper in its issue dated the..... day of.....188 , and was published in each.....issue of said newspaper for.....thereafter the full period of ....., the last publication thereof being in the issue dated the.....day of.....188 .

..... .

Subscribed and sworn to before me, this.....day of ....., A. D. 188 . .....

FORM U.

No. 341. Proof that Plat and Notice Remained Posted on Claim during Time of Publication.

[BLANK PUBLISHED.]

.....of....., County of ....., ss.

....., being first duly sworn according to law, deposes and says that he is claimant (and co-owner with), ... in the ..... mining claim, ... Mining District, ... County, ..., the official plat of which premises, together with the notice of intention to apply for a patent therefor, was posted thereon on the..... day of ....., 188 , as fully set forth and described in the affidavit of ..... and ....., dated the ..... day of....., 188 , which affidavit was duly filed in the office of the Register at ..... in this case; and that the plat and notice so mentioned and described remained continuously and conspicuously posted upon said mining claim from the ..... day of ....., 188 , until and including the ..... day of ... , 188 , including the sixty days period during which notice of said application for patent was published in the newspaper.

.....

Subscribed and sworn to before me, this ..... day of ....., 188 , and I hereby certify that the foregoing affidavit was read to the said ..... previous to his name being subscribed thereto; and that deponent is a respectable person to whose affidavit full faith and credit should be given.

..... [SEAL.]
Notary Public.

FORM V.

No. 346. Statement of Fees and Charges.

[BLANK PUBLISHED.]

..... of ....., County of ....., ss.

..... , being first duly sworn according to law, deposes and says that he is the applicant for patent for the ..... lode in ..... Mining District, county of ..... of ....., under the provisions of chapter VI, of title XXXII, of the Revised Statutes of the United States, and that in the prosecution of said application he has paid out the following amounts, viz., to the credit of the Surveyor-general's office ..... dollars; for surveying ..... dollars; for filing in the local land office ..... dollars; for publication of notice ..... dollars; and for the land embraced in his claim ..... dollars.

.....

Subscribed and sworn to before me, this ..... day of ....., A. D. 188 .

..... [SEAL.]
Notary Public.

In due time, if no adverse claim has been filed, or if filed, but no suit has been commenced thereon within the period prescribed by law, the claimant may make application to purchase. The Register should thereupon certify to the fact of the posting of notice in the land office of the application for patent; and upon payment to the Receiver of the purchase-money should issue his certificate of entry.

FORM W.

No. 342. Register's Certificate of Posting Notice for Sixty Days.

[BLANK PUBLISHED.]

United States Land Office at ... ., ..., 188 .

I hereby certify that the official plat of the ..... lode designated by the Surveyor-general as lot No. ....., was filed in this office on the ..... day of ....., A. D. 188 , and that the attached notice of the intention of ..... to apply for a patent for the mining claim or premises embraced by said plat, and described in the field

notes of survey thereof filed in said application, was posted conspicuously in this office on the ..... day of ....., A. D. 188 , and remained so posted until the ..... day of ....., A. D. 188 , being the full period of sixty consecutive days during the period of publication as required by law; and that said plat remained in this office during that time, subject to examination, and that no adverse claim thereto has been filed.

.....
Register.

NOTE.—The notice posted in the office should be attached to this certificate; a copy of the notice published is the one usually posted in the Register's office.

These Forms, which are designed particularly for lode or quartz claims, may also, with slight modification, be used for placer claims.

The following Forms may appropriately be used:

FORM W.

No. 349. Certificate that no Suit is Pending.

[BLANK PUBLISHED.]

..... of ....., County of....., ss.

I, ..., Clerk of the Court in and for ..... County, ..., do hereby certify that there is now no suit or action of any character pending in said court involving the right of possession to any portion of ..... mining claim, and that there has been no litigation before said court affecting the title to said claim, or any part thereof, for ..... years last past or within the period prescribed by the Statute of Limitations, to wit, ... years, other than what has been finally decided in favor of .....

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in ....., this ..... day of ....., A. D. 188 .

.....
Clerk of the ..... Court.

FORM X.

No. 351. Protest and Adverse Claim.

[BLANK PUBLISHED.]

United States Land Office, ...of.....

In the matter of the application of ..... for a United States patent for the.....lode or mining claim and the land and premises appertaining to said mine, situated in the.....mining district, in.....county,. .... of.....

To the Register and Receiver of the United States Land

Office at.....and to the above-named applicant for patent for the.....lode:

You are hereby notified that.....of the city of ....., county of.....and..... .....of .... and a citizen of the United States of America, is the lawful owner and entitled to the possession of.....hundred feet of the said.....lode or mine described in said application, as shown by the diagram posted on said claim, and the copy thereof filed in the land office with said application, and as such owner this contestant, the said....., does protest against the issuing of a patent thereon to said applicant, and does dispute and contest the right of said applicant therefor.

And this contestant does present the nature of his adverse claim, and does fully set forth the same in the affidavit hereto attached, marked Exhibit A, and the further exhibits thereto attached and made part of said affidavit.

The said.....therefore respectfully asks the said Register and Receiver that all further proceedings in the matter be stayed until a final settlement and adjudication of the rights of this contestant can be had in a court of competent jurisdiction.

Place and date. .....

EXHIBIT A.

.....of....., County of....., ss.

....., being first duly sworn, deposes and says, that he is a citizen of the United States, born in the State of....., and is now residing in ....., that he is the contestant and protestant named in, and who subscribed the notice and protest hereto annexed. Affiant further says that he is the owner by purchase and in possession of the (adverse) lode or vein of quartz and other rock in place, bearing.....and other metals. That the said lode is situated in the ..... mining district, ... county, ...of.....

(The history of the lode should be given in full; for instance, as follows:)

This affiant further says, that on the day of location the premises hereinafter described were mineral lands of the public domain, and entirely vacant and unoccupied, and were not owned, held, or claimed by any person or persons as mining ground or otherwise, and that while the same were so vacant and unoccupied and unclaimed, to wit, on the ..... day of ....., 18.., (name locators,) each and all of them being citizens of the United States, entered upon and explored the premises, discovered and located the said ..... lode, and occupied the same as mining claims. That the said premises so located and appropriated consist of ..... feet in a .....erly direction, and .....

feet in a .....erly direction, as will fully appear by reference to the notice of location, a duly certified copy whereof is hereunto annexed, marked Exhibit B, and hereby made a part of this affidavit. That the locators, after the discovery of said ..... lode, drove a stake on said lode on the discovery claim, erected a monument of stone around said stake, and placed thereon a written notice of location describing the claim so located and appropriated, giving the names of the locators and quantity taken by each, and after doing all the acts and performing all the labor required by the laws and regulations of said ..... mining district and territory of ....., the locators of said lode caused said notice to be filed and recorded in the proper books of record in the Recorder's office in said district on the ..... day of ....., 18...

Affiant further says, that the said locators remained continuously in possession of said lode, working upon the same, and within .. ... months from the date of said location had done and performed work and labor on said location in mining thereon and developing the same, more than .....days' work, and expended on said location more than ..... hundred dollars, and by said labor and money expended upon the said mining location and claim, had developed the same and extracted therefrom more than ..... tons of ore.

And affiant further says, that said locators, in all respects, complied with every custom, rule, regulation, and requirement of the mining laws, and every rule and custom established and in force in said ..... mining district, and thereby became and were owners (except as against the paramount title of the United States) and the rightful possessors of said mining claims and premises.

And this affiant further says, that said locators proved and established to the satisfaction of the Recorder of said ..... mining district that they had fully complied with all the rules, customs, regulations, and requirements of the laws of said district, and thereupon the said Recorder issued to the locators of said ..... lode certificates confirming their titles and rights to said premises.

That the said lode was located and worked by the said locators as tenants in common, and they so continued in the rightful and undisputed possession thereof from the time of said location until on or about the ..... day of ....., A. D. 18.., at which time the said locators and owners of said lode formed and organized under the laws of the State (or territory) of ..... and incorporated under the name of the "....." and on the ..... day of ....., A. D. 18.., each of the locators of said lode conveyed said lode, and each of their rights, titles, and interest

in and to said lode, to said "..... mining company."

On the said ..... day of ....., 18.., the said company entered into and upon said ..... lode and was seised and possessed thereof and every part and parcel of the same, and occupied and mined thereon until the ..... day of ....., 18.., at which time the said ..... mining company sold and conveyed the same to this affiant, which said several transfers and conveyances will fully appear by reference to the abstract of title and paper hereto attached, marked Exhibit D, and made a part of this affidavit.

(In case of individual transfers.)

And this affiant further says, that the said ....., who located claim ..... north-westerly of the said .... lode, and the said ....., who located claim ..... north-westerly thereon, were seised and possessed of said claims, and occupied and mined thereon until the ..... day of ....., 18.., at which time the said .... and ..... sold and conveyed the same to ....., and thereupon the said ..... was seised and possessed of said mining claims and locations, and occupied and mined thereon until the ..... day of ....., 18.., at which time the said ..... . sold and conveyed the same to this affiant, as will fully appear by reference to the abstract of title and paper hereto attached, marked Exhibit D, and which this affiant hereby makes a part of this his affidavit.

Affiant further says, that he is now and has been in the occupation and possession of the said ..... lode since the ..... day of ....., 18.., and that said lode and mining claims were located, and the title thereto established, several ..... before said (applied for) ..... lode was located.

Affiant further says, that said ..... lode, as shown by the notice and diagram posted on said claim, and the copy thereof filed in the United States Land Office, at said ..... with said application for a patent, crosses and overlaps said ..... lode, and embraces about ..... hundred feet in length by ..... hundred feet in width of the said ..... lode, the property of this affiant, as fully appears by reference to the diagram or map duly certified by ....., U. S. Deputy Surveyor, hereto attached, marked Exhibit C, and which diagram presents a correct description of the relative locations of the said (adverse) lode, and of the pretended (applied for) lode.

Affiant further says, that he is informed and believes that said applicant for patent well knew that affiant was the owner in possession and entitled to the possession of so much of said mining ground embraced within the survey

and diagram of said applications, as is hereinbefore stated, and that this affiant is entitled to all the ..... and other metal in said (adverse) lode, and all that may be contained within a space of ..... feet on each side of said (adverse) lode.

And affiant further says, that this protest is made in entire good faith, and with the sole object of protecting the legal rights and property of this affiant in the said (adverse) lode and mining premises.

.....

Subscribed and sworn to before me this ..... day of ....., A. D. 18... .....

SURVEYOR'S CERTIFICATE.

On the diagram marked Exhibit C, the Surveyor must certify in effect as follows:

I hereby certify that the above diagram correctly represents the conflict claimed to exist between the ..... and .... lodes, as actually surveyed by me. And I further certify that the value of the labor and improvements on the (adverse) lode exceeds five hundred dollars, and said improvements consist of (state in full).

Place and date. .....

U. S. Deputy Surveyor.

FORM Y.

No. 354. Notice of Forfeiture.

[BLANK PUBLISHED.]

.... County, ... 18..

To .....

You are hereby notified that I have expended ..... dollars in labor and improvements upon the .... lode ....., as will appear by certificate filed ..... 18.., in the office of the recorder of said county (or district), in order to hold said premises under the provisions of section 2324 Revised Statutes of the United States, being the amount required to hold the same for the year ending ..... 18.. And if within ninety days from the service of this notice (or within ninety days after this notice by publication), you fail or refuse to contribute your proportion of such expenditure as co-owner.., your interest in said claim will become the property of the subscriber under said section 2324.

..... (Signature.)

NOTE.—At the expiration of 180 days, this printed notice should be recorded, with the affidavit of the newspaper publisher that the same was published for the period of ninety days, together with the affidavit of the party signing the notice to the effect that one or more of the co-owners named in the published notice have not paid their share of the expenditure. This completes the record title.

FORM Z.

No. 352. Miner's Lien.

[BLANK PUBLISHED.]

Know all men by these presents, that I, ..., of the county of ....., ... of ....., do hereby give notice of my intention to hold and claim a lien, by virtue of the statute in such case made and provided, upon (describe premises) ..... with all improvements and appurtenances, situated in ..... mining district, county of ....., ... of .....

The said lien being claimed and held for and on account of ....., in and upon said premises, from the ..... day of ....., A. D. 18.., to the ..... day of ....., A. D. 18..

The total value of the said work and labor being ..... dollars, upon which there has been paid the sum of ..... dollars, leaving a balance of ..... dollars still due, owing and unpaid to me, the said claimant.

....

..... of ....., County of ....., ss.

On this .... day of ....., A. D. 18.., personally appeared before me the above named ...., and who, being by me first duly sworn on .... oath, states that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct, and that there is still due and owing to ..... from the said ..... for the ..... aforesaid, the sum of .... dollars and ..... cents.

.....

Subscribed and sworn to before me, this .... day of ...., A. D. 18..

NOTE.—For materials insert "goods furnished and delivered to owners of said premises, for use on said premises, and which were used on said premises." Below, substitute "materials furnished, to wit: Powder, lumber, etc., as per bill annexed," in place of "work and labor."

FORM AA.

No. 432. [BLANK PUBLISHED.]

This indenture, made the .... day of ....., in the year of our Lord one thousand eight hundred and eighty.., between ...., the part.. of the second part, witnesseth, that the said part.. of the first part, for and in consideration of the sum of ..... dollars, ... of the United States of America, to ..... in hand paid by the said part.. of the second part, the receipt whereof is hereby acknowledged, ha.. granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents

do.. grant, bargain, sell, remise, release and forever quit-claim unto the said part.. of the second part, and to ..... heirs and assigns.

Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein; and all the rights, privilges, and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and, also, all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in any wise appertaining, and the rents, issues, and profits thereof; and, also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said part.. of the first part, of, in, or to the said premises, and every part and parcel thereof with the appurtenances.

To have and to hold all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said part.. of the second part.

In witness whereof the said part.. of the first part ha.. hereunto set ..... hand.. and seal.. the day and year first above written.

..... [SEAL.]
..... [SEAL.]
..... [SEAL.]

Signed, sealed, and delivered in presence of
.....
.....

FORM BB.

No. 436. [BLANK PUBLISHED.]

This indenture, made the ..... day of ....., in the year of our Lord one thousand eight hundred and eighty-...., between ....., the part.. of the first part, and the ....., the part.. of the second part, witnesseth: That

Whereas, the said ..... has been duly incorporated under the laws of the ....., and it is intended by this instrument to transfer to the said part.. of the second part all the right, title, and interest of the said part.. of the first part which they and each of them have and claim in and to the mining ground.. and claim.. or lode.. and .... appurtenances hereinafter described.

Now therefore, know all men by these presents, that the said part.. of the first part and each of them whose names are hereunto subscribed, in consideration of certificates of stock in said incorporated company hereafter to be issued to them, their and each of their heirs and assigns, in con-

formity with the by-laws of said corporation heretofore adopted, do hereby grant, bargain, sell, transfer, remise, release, and quitclaim unto the said part.. of the second part, its successors and assigns, all their and each of their right, interest, claim, and demand whatsoever, in law or equity, of, in, or to all ... certain mining ground.., claim.. or lode.. situate, lying, and being.....

Together with all the dips, angles, spurs, and variations of said mining ground.., claim.., or lode.., and all and singular the hereditaments and appurtenances thereunto belonging.

To have and to hold the said premises, with their appurtenances, unto the said part.. of the second part, ... successors and assigns forever.

In witness whereof, the said part.. of the first part ha.. hereunto set .... hand.. and seal.. the day and year first above written.

.... [SEAL.]
..... [SEAL.]
..... [SEAL.]

Signed, sealed, and delivered in the presence of
.....
... .
.....

FORM CC.

No. 125. [BLANK PUBLISHED.]

Know all men by these presents, that ..... held and firmly bound unto ..... . in the sum of ..... dollars, ... of the United States of America, to be paid to the said ..... executors, administrators, or assigns; for which payment well and truly to be made, ... bind ..... heirs, executors, and administrators, ... firmly by these presents. Sealed with ..... seal.., and dated the ... .. day of....., one thousand eight hundred and eighty .....

The condition of the above obligation is such, that if the above bounden obligor.. shall, on the ..... day of ....., one thousand eight hundred and eighty ....., make, execute, and deliver unto the said ....., or to ..... assigns (provided that the said ..... shall, on or before that day, have paid to the said obligor.. the sum of ..... dollars, ... of the United States of America, the price by said ..... agreed to be paid therefor), a good and sufficient deed for conveying and assuring to the said ....., free from all incumbrances, all .... right, title, and interest, estate, claim, and demand, both

in law and equity, as well in possession as in expectancy, of, in, or to that certain portion, claim and mining right, title or property on .... certain vein.. or lode.. of rock containing precious metals of gold, silver, and other minerals, and situated in the ..... mining district, county of ....., and ..... of ..... and described as follows, to wit: .....

Then this obligation to be void, otherwise to remain in full force and virtue.

..... [SEAL.]
..... [SEAL.]

Signed, sealed, and delivered in the presence of

.....
.....

FORM DD.

No. 188. [BLANK PUBLISHED.]

ARTICLES OF INCORPORATION OF THE .....

Know all men by these presents, that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation, under the laws of the State of California, and we hereby certify:

First. That the name of said corporation is .....

Second. That the purposes for which it is formed, are .....

Third. That the place where its principal business is to be transacted shall be .....

Fourth. That the term for which it is to exist is ..... years from and after the date of its incorporation.

Fifth. That the number of its directors or trustees shall be ....., and that the names and residences of those who are appointed for the first year are:

NAMES.	RESIDENCES.
.....	.....
.....	.....

Sixth. That the amount of the capital stock of this corporation shall be ..... dollars, divided into ..... shares of the par value of ..... dollars each.

Seventh. That the amount of said capital stock which has been actually subscribed is ..... dollars, and the following are the names of the persons by whom the same has been subscribed, to wit:

NAMES OF SUBSCRIBERS.	NO. OF SHARES.	AMOUNT.
.....	.....	.....
.....	.....	.....

In witness whereof, we have hereunto set our hands and seals, this ..... day of ....., 18..

.... [SEAL.]
..... [SEAL.]

Signed and sealed in the presence of .....

State of California, ... County of ....., ss.

On this ..... day of ....., in the year one thousand eight hundred and eighty ....., before me, ..., a notary public in and for said ..... county, residing therein, duly commissioned and sworn, personally appeared ..... known to me to be the persons whose names are subscribed to the foregoing instrument, and they each duly acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in said ..... county, the day and year last above written.

.....
Notary Public.

FORM EE.

No. 151. Old No. 710. [BLANK PUBLISHED.]

BY-LAWS OF THE.....

ARTICLE I.

The officers shall consist of a President, Vice-President, Treasurer, and Secretary, who shall, with the exception of the Secretary and Treasurer, be chosen by the Directors from among themselves.

ARTICLE II.

SEC. 1. A Board of Directors shall be elected at the annual meeting of the stockholders. The directors elect shall serve for one year from ....., and until their successors are elected and qualified.

SEC. 2. No stockholder shall be eligible for election as a member of the Board of Directors unless he is a *bona fide* owner of at least ..... shares of the capital stock of the company at the time of his election.

ARTICLE III.

SEC. 1. PRESIDENT. The President shall preside at all meetings of the Directors or stockholders. He shall sign, as President, all certificates of stock, and all contracts, and other instruments in writing which have been first approved by the Board of Directors. He shall draw all checks and warrants upon the treasury. He shall have the casting vote at all meetings of stockholders or Directors. He shall call the Directors together whenever he deems it necessary;

and he shall have, subject to the advice and control of the Directors, the general superintendence of affairs of the company. In the absence of the President, the Vice-President shall perform his duties.

SEC. 2. TREASURER. It shall be the duty of the Treasurer to keep safely all moneys and bullion belonging to the company, and disburse the same under the direction of the Board of Directors, on warrants signed by the President and Secretary. At each annual meeting of the stockholders he shall submit a complete statement of his accounts for the past year, with the proper vouchers for their information. He shall discharge such other duties pertaining to his office as shall be prescribed by the Board of Directors.

SEC. 3. SECRETARY. It shall be the duty of the Secretary to keep a record of the meetings of the Board of Directors and of the stockholders. He shall keep the book of blank certificates of stock, fill up and countersign all the certificates issued, and make the corresponding entries on the margin of each book, on such issuance. He shall keep a proper transfer book, and a stock ledger in debit and credit form, showing the number of shares issued to and transferred by any stockholder, and the dates of such issuance and transfer. He shall countersign all checks, keep proper account books, and discharge such other duties as pertain to his office, and are prescribed by the Board of Directors.

ARTICLE IV.

The Board of Directors shall have power: 1. To call meetings of stockholders when they deem necessary, giving not less than two weeks' notice thereof, in manner as hereinafter provided; and they shall call meetings of the stockholders at any time, upon a written request for that purpose, of persons representing .....of all the capital stock; 2. To make rules and regulations not inconsistent with the laws of ....., or the by-laws of the company, for the guidance of the officers and management of the affairs of the company; 3. To declare dividends out of the surplus profits, whenever they shall deem it expedient; 4. To incur such indebtedness as they may deem necessary; *provided*, however, that no indebtedness over ..... shall at any time be incurred by the company, and to authorize the execution, by the President and Secretary, of any note for such indebtedness.

ARTICLE V.

It shall be the duty of the Board of Directors: 1. To cause to be kept a complete record of all their meetings and acts, and also of the proceedings of the stockholders; and to present a full statement at the regular annual meet-

ing of the shockholders, showing in detail the assets and liabilities of the company, and generally the condition of its affairs. A similar statement shall be presented at any other meeting of the stockholders, when thereto required by persons representing at least ..... of the capital stock of the company; 2. To supervise all the acts of the officers and employees, require the Secretary and Treasurer to keep full and accurate books and accounts, and to prescribe the form and mode of keeping such books; 3. To cause to be issued to the stockholders, in proportion to their several interests, certificates of stock, not to exceed in the aggregate the capital stock of the company; 4. To cause the moneys of the company to be safely kept, directing, from time to time, where they shall be kept or deposited.

ARTICLE VI.

A general Superintendent shall be appointed by the Board of Directors, and be removable at their pleasure. It shall be his duty: 1. To take charge of all the property belonging to the company, and to control and direct all labor and business pertaining to the interests, objects, and operations of the company, at the mines, but entirely subject to the direction and control of the Board of Directors, or of the President of the company; 2. To make monthly returns to the Board of Directors, of all persons hired or employed at the mines and works, add a statement of all expenditures, accompanying the same with the necessary vouchers, and a similar statement of ore extracted, and the disposition of the same, and report the general condition of the mines and works; 3. To make requisition upon the Board of Directors for necessary funds, stating the precise objects for which they are required, and if approved by the board, the money shall be transmitted to him in such mode as they may direct; but he shall not have the power to sign notes or contracts for the company; neither shall he have the power to incur any indebtedness, unless so especially authorized by the President or Board of Directors.

ARTICLE VII.

The members of the Board of Directors shall receive no compensation for their services as such, nor shall the company be held liable for any services rendered, except it is so expressly provided; but members of the board shall be allowed their reasonable traveling expenses when actually engaged in the business of the company, to be audited and allowed as in other cases of demands against the company. The Secretary and Superintendent shall receive such compensation for their services as the Board of Directors shall determine.

ARTICLE VIII.

No contract by any officer of the company shall be valid without the previous authorization or subsequent ratification of the Board of Directors.

ARTICLE IX.

SEC. 1. The regular annual meeting of the stockholders shall be held on the ..... of each year, at the office of the company, in the ..... of ..... A representation of a majority of the capital stock shall be necessary for the transaction of the business of all meetings of stockholders. At such meetings a representation by proxy, duly appointed, shall be allowed, such proxy to be in writing, and filed with the Secretary of the company.

SEC. 2. A regular ..... meeting of the Board of Directors shall be held on the....., and special meetings of the Board may be called by the President whenever he may deem it expedient. A majority of the Board of Directors shall constitute a quorum for the transaction of business.

SEC. 3. All meetings of stockholders shall be called by a notice published at least three times a week for two weeks in a daily newspaper in the ....., and also in ... .

ARTICLE X.

Certificates of stock shall be of such form and device as the Board of Directors may direct, and such certificates shall be signed by the President and Secretary, and express on its face their number, date of issuance, number of shares for which, and the persons to whom issued. Several certificates may be issued to the same person or persons, provided that in the aggregate they do not exceed the number of shares belonging to such person or persons. The certificate book shall contain a margin on which shall be entered the number, date, number of shares, and the name or names of the person or persons expressed in the corresponding certificates.

ARTICLE XI.

Shares of the company may be transferred at any time by the holders thereof, or by attorney legally constituted, or by legal representative. But no transfer shall be valid except between the parties thereto, until entered in the proper form on the books of the company. The surrendered certificates shall be canceled before a new certificate shall be issued in lieu thereof. The receiver of the new certificate shall be required to signify his assent to the by-laws of the company; and no transfer of any share of stock shall be valid, upon which any assessments are due and unpaid,

or the holder of which is indebted to the company on any account whatever, without the consent of the Board of Directors.

ARTICLE XII.

The books and papers, in the office of the Secretary and Treasurer, shall at all times during business hours, be open to the inspection of the Board of Directors, and of any stockholder.

ARTICLE XIII.

These by-laws may be altered or amended at any annual meeting of the company, or at any special meeting called for that purpose, by a vote of two-thirds of the subscribed stock.

ARTICLE XIV.

These by-laws shall always remain in possession of the Secretary of the company.

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